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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE ex rel. W. J. MICHAEL CODY,
Attorney General and Reporter,
Petitioner,

vs.

ELIZABETH H. DOLE, in her official capacity as Secretary, United States Department of Transportation; R. A. BARNHART, in his official capacity as Administrator, Federal Highway Administration, United States Department of Transportation; and E. G. OAKLEY, in his official capacity as Division Administrator, Federal Highway Administration, United States Department of Transportation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM H. FARMER
Advocate General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6474
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether the federal government has any right to settlement funds recovered by a state as a result of agreements between the state and highway contractors resolving state claims for damages due to collusive bidding practices by the contractors.

2. Whether the Court of Appeals can grant the common law remedy of restitution to the federal government permitting it to receive funds collected by a state when Congress has enacted a federal statutory claim for recovery that the federal government did not pursue.

3. Whether the federal government can be equitably estopped from asserting a claim to state settlement funds after collection when prior to collection, the government, through the Office of the U. S. Attorney General, advised the state that the federal government had "no interest" in the funds.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitution and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	12
Appendix:	
A - Published Opinion of Sixth Circuit Court of Appeals	A-1
B - Order Denying Petition for Rehearing Entered by the Sixth Circuit	A-13
C - Published Opinion and Order of the United States District Court for the Middle District of Tennessee	A-14
D - Pertinent Sections of Title 23, United States Code (The Federal Highways Act)	A-50

TABLE OF AUTHORITIES

Cases:

I.N.S. v. Hib, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973)	11

Northwest Airlines v. Transport Workers Union, 451 U.S. 93 (1981) 11

Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) 11

State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973) 11

United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981) 7,8

United States v. Cooper Corp., 312 U.S. 600 (1941) 10

Constitutional Provisions:

Article 1, Section 8, United States Constitution 2,5

Statutes:

15 U.S.C. §§ 1 5

15 U.S.C. § 14a 2

15 U.S.C. § 15 5

15 U.S.C. § 15a 4,5,10,11

23 U.S.C. § 101 *et seq.* .....*passim*

28 U.S.C. § 516 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1361 5

28 U.S.C. § 2201 5

28 U.S.C. § 2202 5

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, the State of Tennessee ex rel. W. J. Michael Cody, Attorney General and Reporter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 29, 1984.

OPINION BELOW

The opinion of the Court of Appeals is reported at 749 F.2d 331. The opinion of the District Court for the Middle District of Tennessee is reported at 567 F.Supp. 704.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 29, 1984. A timely petition for rehearing en banc was denied on January 21, 1985, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, United States Constitution.

> The Congress shall have power to lay and collect Taxes, Duties, Imports and Excises, to pay the debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imports and Excises shall be uniform throughout the United States;....
>
> To...post roads;...—and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,

United States Code, Title 15; § 14a. Suits by United States, amount of recovery.

> Whenever the United States is hereinafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

United States Code, Title 23; §§ 101 *et seq.* The Federal Aid Highways Act, particularly §§ 104(b), 105, 106(a) and 118(b). (These sections are reproduced in the appendix).

United States Code, Title 28; § 516, Conduct of Litigation Reserved to Department of Justice.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Section 519. Supervisor of Litigation.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under Section 543 of this title in the discharge of their respective duties.

STATEMENT OF THE CASE

This dispute is between the State of Tennessee and the federal government.

Within Tennessee for several years, many contractors were involved in collusive bidding practices while doing business with the State, bidding on various highway construction projects. Some of the projects were funded totally by the State, others were partially or substantially financed through the Federal Aid Highways Act, Title 23, U.S.C. § 101 *et seq.* (Highway Act).

The State had highways financed through the Highway Act by first having an entire *program* approved by the federal government, then having each individual road *project* approved by the government, contracting the work out, paying the contractors with state funds, and then submitting vouchers to the federal government for reimbursement of the Highway Act share of the particular project. Before the planning by the State to build roads began, the State knew how much of their funds would be reimbursed under the Highway Act and would build as much road as they could for the *fixed* amount already appropriated to the State through the Highway Act.

Consequently, the federal government never reimbursed the State one penny more than the amount appropriated under the Highway Act. The effect of the bid-rigging that occurred never in any instance *increased* the reimbursement cost to the government as that amount was always fixed at a sum certain before the contracts were ever let. The same amount would have been paid whether or not there was bid-rigging on highway contracts.

The actual effect of bid-rigging was that the State of Tennessee got less road for the same money; i.e., but for bid-rigging, Tennessee would have more road.

The federal government began a criminal investigation into bid-rigging in Tennessee in 1979. Many contractors were indicted and plead guilty to charges of antitrust violations growing out of the bid-rigging activities on Highway Act projects with Tennessee.

Shortly thereafter, Tennessee began a civil investigation into bid-rigging in an effort to recoup state claims for the loss of state highways as a result of overcharges due to bid-rigging. Numerous settlements were reached between the State and various contractors wherein the State released the contractors only from the "claims of the State."

The federal government never pursued its civil claims under the federal anti-trust act (15 U.S.C. § 15a) against the contractors.

Sanford M. Litvack, Assistant Attorney General, United States Department of Justice, Antitrust Division, advised the State's Attorney General that he was supervising the bid-rigging litigation and prosecution in Tennessee that was involved directly with Highway Act funds. Mr. Litvack further advised on September 10, 1980, that the United States had no interest in Tennessee's efforts to recover any overcharges due to bid-rigging on highway construction projects under the Highway Act. Mr. Litvack further advised the State Attorney General of

two cases wherein the federal government had recently either taken the position or the Court held that recoveries of overcharges from bid-riggers were state, not federal, funds.

This lawsuit was precipitated shortly thereafter when the division administrator of the Federal Highway Administration began seeking settlement information from the State to credit the amount back to the "federal share" of those projects which were rigged and partially financed through the Highway Act.

The State of Tennessee filed the instant action in the United States District Court for the Middle District of Tennessee against the Secretary of the United States Department of Transportation on January 13, 1983, seeking declaratory judgment and injunctive relief prohibiting the federal government from withholding funds from Tennessee's share of Highway Act appropriations to offset a portion of the State's recovery of some of the overcharges due to collusive bidding practices (bid-rigging) by contractors on numerous highway projects within the State.

The jurisdictional bases in the District Court in this action were several. First, the Court exercised its jurisdiction under 28 U.S.C. § 1331 as this action arose under the United States Constitution, Article 1, Section 8, and several federal statutes, the Federal Aid Highways Act, 23 U.S.C. §§ 101 *et seq.* and the Sherman and Clayton Antitrust statutes, 15 U.S.C. §§ 1, 15, 15a. The District Court also exercised jurisdiction under 28 U.S.C. § 1361 that permits the District Court to entertain claims for injunctive relief against federal officers and employees who take unauthorized administrative actions. Finally, this Court entertained the State's claims under 28 U.S.C. §§ 2201 and 2202 for declaratory judgment and other appropriate relief to determine the legal relations of the parties under federal law, that in this case, is the Federal Aid Highways Act of 1956, as amended, 23 U.S.C. §§ 101 *et seq.*

Trial on the merits was consolidated with the State's motion for preliminary injunctive relief on April 28, 1983.

On May 18, 1983, the District Court entered a memorandum opinion and order (567 F.Supp. 704) granting the relief sought by the state holding that "...by operation of the Highway Act, the funds at issue in this case are State funds." (567 F.Supp. at 712).

The federal government appealed to the Court of Appeals for the Sixth Circuit, and on November 29, 1984, the Sixth Circuit issued an opinion reversing the judgment of the district court and remanding the matter to "district court to weigh and balance the equities concerning the precise amount of the federal share the State should be permitted to retain and the precise amount it owes to the federal government as restitution." (749 F.2d at 337).

The Court of Appeals *sua sponte* decided the case on an "unjust enrichment" principle of federal common law.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of another court of appeals as to whether the federal government is injured when collusive bid-rigging practices occur on Highway Act projects.

The decision below expressly holds that the federal government is injured by bid-rigging done on Highway Act cases. The impact of this holding is significant. Within the Sixth Circuit, the federal government will be able to prevail upon the state's recovery efforts in enforcing state antitrust violations involving millions of dollars (as does the instant case) relying on a federal common law right of restitution; while in the Seventh Circuit, the federal government is not considered injured by bid-rigging activity in Highway Act projects.

In *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), the government brought suit for a false claim by a bid-rigging contractor on a Highway Act case. The Seventh Circuit held the government sustained no injury as a result of bid-rigging on Highway Act projects:

> Under the Federal Aid Highways Act, the Government contributed a fixed sum to Illinois to assist in the construction of the two highways at issue here. The ceiling on the Federal contribution imposed by the Highway Act, however, operated to insulate the United States from any overcharge. Although the overcharge may have increased the contribution of the United States toward the two particular projects, it did not affect the Government's overall contribution to Illinois....Here, the injury was suffered by the State of Illinois, and it is that governmental body which has a cause of action resulting from the overcharge." *United States v. Azzarelli Construction Company,* 647 F.2d at 761 (1981).

The decision below squarely conflicts with the Seventh Circuit in application of the unjust enrichment theory which forms the basis for the common law remedy of restitution.

The Sixth Circuit below holds that the states are unjustly enriched to some extent when they collect money in settlement of state claim from contractors guilty of bid-rigging on Highway Act projects.

The Seventh Circuit, in *Azzarelli, supra,* holds the opposite; i.e., it is the federal government, not the state, who would be unjustly enriched if allowed to recoup overcharges due to contractors' bid-rigging on Highway Act cases:

> The federal contribution to highway construction in Illinois for the year in question was a fixed sum. Although Illinois received that sum, the alleged overcharges required it to pay out an exessive portion of the grant to the contractors, thus impairing the remainder of the amount. It is Illinois whose treasury funds have been reduced by the overcharges. In the framework of periodic grants to the state, if the government may sue under the False Claims Act, the government will presumably be able to replenish its treasury to a higher level than that pertaining after the grant to Illinois was originally made. We are reluctant to award the government such a serendipitous benefit.

647 F.2d 762.

This conflict justifies the grant of certiorari to review the judgment below.

2. The decision below raises substantial uncertainty in the distribution of millions of dollars of public funds, the administration of the Federal Aid Highways Act, and the ability of the sovereign states to enforce their individual claims for violations of state and federal antitrust laws within their jurisdiction.

Several states across the country have entered and will attempt to enter into settlements with bid-rigging contractors on Highway Act cases involving millions of dollars in claims for violations of state and federal antitrust laws.

The decision below hampers the states' ability to enforce violations of the law through powers granted the states by Congress and their individual legislatures.

How can a state, interested in protecting its citizens from the loss of miles of roads and millions of dollars at the hands of bid-riggers, have any ability to collect damages for settlements of state claims when the federal government will, after the fact, demand "restitution" of some unstated arbitrary amount of the funds the state collected with no help from the federal government? The amount of money available to the states for future road building or general funds is completely uncertain under the decision below. If "restitution" and "incentive" are determined monetarily on a case by case basis, the uncertainty of the funding status of the states' highway programs will be vast and permanent.

This uncertainty also pervades the settlement process itself. The decision below gives no guidance to the recurring problem many states will have in negotiating with a bid-rigging contractor when the federal government either declines (as in the case below) or insists on being a separate party to the negotiations.

How much of a settlement relates to expenses, to incentive, to state claims versus federal claims, will remain unanswered in each state and left for resolution by countless after-the-fact battles between the federal government and the states in the district courts across the land.

Confusion rather than clarity will be the rule of the decision below concerning such important issues as how much highway funds a state will have at any given time, when a state should pursue a bid-rigging state claim, when the state should defer to

the federal government, what the state should do if the federal government does nothing to collect its own damages.

Finally, the decision below permits the federal government to sit on its rights, i.e., to ignore its own antitrust enforcement powers under Title 15, U.S.C. § 15(a) and simply let the state raise millions of dollars from bid-riggers then assert a claim of "restitution" against the states while requiring nothing of the bid-riggers. Such a result is anomalous and far reaching.

3. The decision below erroneously applies federal common law remedies.

The decision below relied upon the theory of unjust enrichment by the state to the detriment of the United States. The Sixth Circuit concluded that the Secretary of the United States Department of Transportation may exercise an implied right of recoupment to regain from the state funds the bid-rigging contracts extracted from the public; and further that the state should never have recovered these funds in the first instance. The decision below clearly contravenes the Supreme Court's express holdings on implied governmental remedies.

In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the United States was allegedly injured by reason of antitrust violations, the Supreme Court articulated the legal principle that "Congress has not left us at large to devise every feasible means for protecting the government as a purchaser. *It is a function of Congress to fashion the means to that end.*" *United States v. Cooper Corp.*, 312 U.S. at 606 (emphasis added). Since that decision, Congress has addressed the remedy for bid-rigging acts that injure the United States. *See,* 15 U.S.C. § 15(a). The decision below by applying common law remedies clearly contravenes the Supreme Court's principle that "once Congress addressed a subject, *even a subject previously governed by federal common law,* the justification for law making by the courts is greatly diminished, thereafter the task of the federal courts is to

interpret and apply statutory law *not to create common law.* (Emphasis added). *Northwest Airlines v. Transport Workers Union,* 451 U.S. 93 (1981). In the instant case, the United States has conceded that it had a federal statutory claim (15 U.S.C. § 15a) for bid-rigging acts on Highway Act projects.

Courts have declined to imply any legal authority for the Secretary of Transportation to withhold funds to the states awarded by Congress under the FAHA, because under Article 1, Section 8 of the Constitution, the building of roads is a congressional function, not an executive function. *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099 (8th Cir. 1973). The decision below runs counter to this well established line of judicial authority.

Finally, as the Eighth Circuit in *Volpe* held, the Federal Aid Highways Act (23 U.S.C. § 101 *et seq.*) is a comprehensive act. There is a legal presumption that where there is comprehensive act and Congress omits a remedy (such as restitution from a state), the judiciary may not imply that remedy. *Northwest Airlines v. Transport Workers Union,* 451 U.S. 93, 97 (1981).

4. The doctrine of equitable estoppel against the government may require clarification by this Court.

The state, in pursuing bid-rigging damages collection efforts on its own behalf, relied on the representations of the Office of the Attorney General of the United States that the federal government had no interest in the funds collected by the state.

This is an alternative reason for granting the writ and will be moot if the Court accepts the state's position that the government as a matter of law is not entitled to restitution of the collected funds.

This Court has recognized the availablity of equitable estoppel against the government. See *Schweiker v. Hansen,* 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981); *I.N.S. v. Hib,* 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973).

In addition to the usual elements of estoppel as against private parties in order to assert estoppel against the government, there must exist an element of misrepresentation, misconduct or concealment by the government. This Court could clearly define this element of misconduct in the instant case where the government has taken inconsistent positions while letting the state expend resources on a good faith belief that the Attorney General's position would not be reversed.

The district court below found this to be adequate for its alternative holding that the government should be estopped. The Sixth Circuit decision leaves unclear when, if ever, the principle of estoppel could be applied against the government.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

WILLIAM H. FARMER
Advocate General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
Attorney for Petitioner

April 18, 1985

APPENDIX

APPENDIX A

State of Tennessee ex rel. William M. Leech, Jr.,
Attorney General & Reporter,
Plaintiff-Appellee,

v.

Elizabeth H. Dole, in her official capacity as Secretary, United States Department of Transportation; R. A. Barnhart, in his official capacity as Administrator, Federal Highway Administration, United States Department of Transportation; and E.G. Oakley, in his official capacity as Division Administrator, Federal Highway Administration, United States Department of Transportation,
Defendants-Appellants.

No. 83-5499.

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 20, 1984.

Decided Nov. 29, 1984.

Before MERRITT and JONES, Circuit Judges, BELL, District Judge.*

MERRITT, Circuit Judge.

This case is in effect a fight between the State of Tennessee and the United States over damages the State has recovered from bid riggers on federally funded road projects. Brought by the State against federal road officials for injunctive and declaratory relief, the principal questions are whether the rela-

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* The Honorable Samuel H. Bell, Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

tionship between the State as a federal grant recipient and its federal grantor is governed by the law of restitution or unjust enrichment under federal common law principles and whether jurisdiction of such issues resides exclusively in the Court of Claims, rather than the District Courts, under the Tucker Act. We hold that the State's claims to all the money recovered, though outside the Tucker Act, are contrary to applicable legal principles of unjust enrichment arising from benefits conferred by mistake; and we remand the case to the District Court to weigh the equities of the parties in order to determine the precise amount of the State's recovery owed as restitution to the federal government.

I.

The process of federal highway construction funding proceeds through several stages. Congress authorizes a division of funds for each state according to a statutory formula. These funds are initially maintained in an account called an "unprogrammed balance account" administered by the Federal Highway Administration of the Department of Transportation. In order to draw on the account, the state must first have its highway program approved and then later have its plans for individual projects approved. Once a project is approved a bookkeeping entry is made shifting the funds into a project account. After the project is bid out by the state, federal road officials must approve the award of the bid. A project agreement is then executed with the state. The agreement obligates the government to reimburse the state for a share of the construction costs—usually ninety percent on interstate highway projects and seventy-five percent on most other projects. There are various rules regarding the lapse of unexpended funds, and in recent years the Secretary has imposed an inflation-fighting or a deficit-fighting ceiling on each state's expenditures in an amount less than the Congressional authorization. In 1982, for example, Congress authorized $171 million for Tennessee; but the Secretary's ceiling limited Tennessee to $144 million.

After the Justice Department obtained criminal convictions against approximately 70 firms and individuals for bid rigging on Tennessee road projects in violation of the Sherman Antitrust Act, the Tennessee Attorney General entered into settlements with some of the contractors for approximately $12 million. The State admits that a significant portion of this amount is attributable to the contribution of the federal government to state highway projects, although the record is unclear as to the exact amount of the settlements, the amount so far collected and the amount attributable to the federal contribution. The theory of the settlements is that the bid rigging contractors fixed the prices that otherwise would have prevailed. The federal officials would not have funded the projects, and the State would not have accepted the bids, had they known that the bid prices were the result of contractor collusion.

When the State initiated its investigation, antitrust Assistant Attorney General Litvack advised Tennessee Attorney General Leech that his office "had no interest in Tennessee's efforts to recover any over charges due to bid rigging on federal highway construction projects" and that Tennessee's efforts to recover "were matters for the State and its officials."

Despite these assurances from the Antitrust Division, in mid-1981, more than a year after the State investigation and settlement process had begun, federal highway officials wrote a series of letters addressed to various Tennessee officials, including the Commissioner of Transportation and the Attorney General, seeking information concerning settlements made for the purpose of determining how much of the settlement should be attributed to the federal share contributed to highway projects. The State officials in response consistently took the position that "we have researched the law in this matter," and "we cannot discern any legal basis" for the claim of the federal road officials that the federal government should "participate in the State antitrust settlement fund."

When State officials refused to give federal road officials the information they requested regarding the settlements, the federal officials computed from the information they had in their files a sum in excess of $4.5 million that they claimed must be set off against current highway funds allocated to the State of Tennessee, thereby reducing the State's funding on current projects. The federal officials took the position, however, that "the sums subtracted from the current billings"—the $4.5 million setoff—"can be restored to the unprogrammed balance" of funds for future highway construction projects in Tennessee.

The federal officials now take the position that this method of handling the $4.5 million setoff will have the effect of reducing current year federal highway funding for Tennessee road projects but will increase by precisely the same amount road funds for Tennessee's use in future years. The State disputes this contention. It claims that under the Highway Act the State will have to come up with approximately twenty-five percent in matching funds, or $1,200,000, in order to get the benefit in future years of the $4.5 million that will be taken by the setoff from the State's settlement funds. The State further contends that the $4.5 million setoff is expressly "subject to available obligation authority" and that it is unlikely that the State will actually receive the benefit of the $4.5 million credit in future years in light of the ceilings now being imposed. The record is unclear as to the actual effect, in dollars and cents, of the $4.5 million setoff against current funding because it is unclear how much of this money will be restored in future years.

A stalemate occurred in the negotiations between the parties, and the State filed this action in January, 1983. In its complaint the State claimed that the federal government is not entitled to any portion of the settlement fund and requested that the District Court enjoin the federal defendants from taking any administrative action to retrieve by setoff the federal share of such recoveries.

The defendants opposed the injunction on the grounds that the action is in effect a suit on a contract with the United States for more than $10,000 and that under the Tucker Act only the Court of Claims has jurisdiction of such contract actions. On the merits the defendants argued that federal policy and common law legal principles of restitution require that when a state recovers over-charges on federal aid highway projects, the federal share of the recovered sum must be credited back to the projects on which the over-charges occurred. The defendants argued that only by such a credit could the federal share of road construction programs be kept within statutory limits set out in the Highway Act, 23 U.S.C. § 120, and that if the State keeps the entire recovery, it will be unjustly enriched by collecting this money twice, once from the federal government initially as a part of the project cost and then from the bid riggers in settlement of their over charges.

After concluding that the Tucker Act constituted no bar to its jurisdiction, the District Court held that once federal highway funds are apportioned to the states, or alternatively, once federal road officials approve a particular state project, the funds become state funds and are in the nature of outright "gifts" to the states in which the federal government no longer has a legal interest. The Court further held that the federal defendants have no statutory or other authority to set off or otherwise recover such "gifts" paid through mistake. Finally, as an alternative holding, the Court found that the government is equitably estopped from attempting to recover the federal share of the settlement funds because former antitrust Assistant Attorney General Litvack had denied a federal interest in the settlement efforts. 567 F.Supp. 704.

Accordingly, the District Court enjoined the federal defendants from setting off the federal share of the settlement fund against current billings.

II.

The federal government argues that the District Court lacked jurisdiction because the Tucker Act, particularly 28 U.S.C. §1346(b) and 28 U.S.C. § 1491(a)(2) vests exclusive jurisdiction over this suit in the Court of Claims.[1] While these provisions could well be read as precluding District Court jurisdiction over all claims not within the $10,000 limit that could have been brought in the Court of Claims under 28 U.S.C. § 1491(a), such a literal reading of the substantive claims encompassed by that provision has long been rejected. Instead, "it is not every claim

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[1] 28 U.S.C. § 1346(a)(2) provides:

> (a) The district courts shall have original jurisdiction concurrent with the United States Claims Court, of:
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491(a)(1) provides in part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

involving or invoking the Constitution, a federal statute or regulation which is cognizable in the Court of Claims." *Eastport Steamship Corp. v. United States,* 372 F.2d 1002, 1007, 178 Ct.Cl. 599 (1967). Exclusive Court of Claims jurisdiction is limited to suits founded on contract involving more than $10,000. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4101, at 210 (1978). This limitation is especially important in light of the 1976 amendments to 28 U.S.C. §1331(a), which eliminated the requirement of a specified amount in controversy as a prerequisite to the maintenance in District Court of an action "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub.L. No. 94-574, 90 Stat. 2721 (1976).[2] Interpreting this provision, the Supreme Court has observed:

> The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on Federal Courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate.

Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). In determining whether the Court of Claims has exclusive jurisdiction in this case, we must therefore "be careful not to subvert congressional objectives underlying the enactment of the judicial review statute by allowing the government to give an overly expansive scope to the notion of claim 'founded upon' a contract." C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4101, at 210-11 (1978).

The present case is not an action upon a contract for damages. It is rather an action for injunctive relief to prevent

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[2] As further amended in 1980, § 1331 now provides for federal court jurisdiction of "all civil actions arising under the Constitution, laws or treaties of the United States." (Pub.L. No. 96-486, 94 Stat. 2369), (1980).

the defendants from carrying out a policy of deducting under a theory of unjust enrichment amounts previously paid to the State by mistake. The Court of Claims does not have exclusive jurisdiction over this suit, becaue although the federal government seeks to recoup its share of the State's recovery by refusing to honor vouchers submitted by the State, the main issues in the case sound in restitution, not contract. The Court of Claims does not have exclusive jurisdiction over a suit merely because it raises contract related issues. *See B.K. Instrument, Inc. v. United States,* 715 F.2d 713, 727 (2d Cir.1983) (action alleging that government contract was awarded in violation of statutory procedures); *Megapulse, Inc. v. Lewis,* 672 F.2d 959, 968 (D.C.Cir.1982) (Court of Claims did not have exclusive jurisdiction over suit by government supplier seeking to enjoin Coast Guard from releasing to the public data on the product supplied). *Aleutco v. United States,* 244 F.2d 674, 678 (3rd Cir.1957) (District Court had jurisdiction over suit for conversion brought by a purchaser of surplus government materials when the Navy refused to release the goods). Courts have previously found jurisdictional authority under 28 U.S.C. § 1331 to hear suits involving the legality of impoundment of highway funds, *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099, 1105 (8th Cir.1973), and disbursement to state education agencies of federally provided funds, *People Ex Rel Bakalis v. Weinberger,* 368 F.Supp. 721, 723 (N.D.Ill.1973). The present suit is likewise clearly not "grounded in contract" and therefore not subject to exclusive Court of Claims jurisdiction.

Our decision that the District Court properly exercised jurisdiction over plaintiff's claim recognizes the policy of preserving the Tucker Act's limited and conditional waiver of sovereign immunity in contract actions. Indeed, as the Supreme Court emphasized in *United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 2968, 77 L.Ed.2d 580 (1983), a claim is only cognizable under the Tucker Act if it is for money damages and is based on a source of substantive law mandating compensation

by the Federal Government. It is doubtful, therefore, whether this suit could even be heard by the Court of Claims, as plaintiff seeks only declaratory and injunctive relief. While it is clear that a claimant may not avoid the exclusive jurisdiction of the Court of Claims merely by framing a complaint to seek nonmonetary relief when the result would be the equivalent of obtaining money damages, *American Science & Engineering, Inc. v. Califano,* 571 F.2d 58, 61-62 (1st Cir.1978), neither does the Court of Claims possess exclusive jurisdiction simply because a suit for nonmonetary relief may form the basis for a later money judgment. *See Beller v. Middendorf,* 632 F.2d 788, 799 (9th cir.1980), *cert. denied,* 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405, *reh. denied,* 454 U.S. 1069, 102 S.Ct. 621, 70 L.Ed.2d 605 (1981); *Glines v. Wade,* 586 F.2d 675, 681 (9th Cir.1978). District Court jurisdiction in the present case thus supports the Congressional policy of liberalized judicial review animating the 1976 amendments to § 1331, while respecting the Court of Claims' special competence and experience in cases involving the interpretation and review of government contracts.

III.

The federal common law is the source of the legal principles which govern the parties' claims in this action. The federal common law controls rights of recovery in disputes between the federal government and others arising from legal relationships created but not fully defined or delineated by federal constitutional and statutory law. *See Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U.L.Rev. 383 (1964). The government's unjust enrichment claims based on benefits conferred by mistake under the Federal Highway Act and the State's rejection of such claims are governed, therefore, by federal common law.

IV.

Under federal common law principles, the District Court was clearly mistaken in holding that the government cannot take advantage of the law of restitution to recover grant monies paid out through mistake. The federal share was not an outright "gift" with no strings attached. It was paid to the State for particular purposes subject to definite conditions. It contemplated construction contracts and valid competitive bidding.

The earlier federal cases on this subject involve contract carriers of mail, naval and other 19th century defense contractor claims, and the claims of military officers. In *Wisconsin Central R.R. Co. v. United States,* 164 U.S. 190, 208-09, 211, 17 S.Ct. 45, 50-51, 41 L.Ed. 399 (1896), a mail contract case, Chief Justice Fuller reviews many of the older cases on government monies similarly paid through mistake. " 'Overpayments made at one time by mistake,' " he says, quoting earlier cases, can " 'be corrected and properly charged against credits coming in afterwards' "—unless " 'peculiar circumstances appear to make such recovery inequitable and unjust' " (citations omitted).

In *Grand Trunk Western Ry. Co. v. United States,* 252 U.S. 112, 120-21, 40 S.Ct. 309, 311-12, 64 L.Ed. 484 (1920), another mail case, Justice Brandeis, relying on the *Wisconsin Central* case, reiterates the point that "it was the duty of the Postmaster General to seek to recover [for] over payment[s]," and he "was at liberty to deduct the amount of the over payment from the monies otherwise payable...." *See also United States v. Mead,* 426 F.2d 118 (9th cir.1970) (applying unjust enrichment principles arising from benefits conferred by mistake to government payment to farmer-contractor in farm conservation program).

V.

The case below was tried on a basis inconsitent with general principles of restitution. The case was tried on an all-or-nothing basis—either the State is entitled to keep all the bid rigger money recovered or the federal officials are entitled to a full

setoff and restitution of all of the federal share initially paid on the projects. In fact, principles of restitution are flexible, not rigid, as Chief Justice Fuller indicated in the *Wisconsin Central* case, *supra*. They take into account, as he said, the "peculiar circumstances" of the situation and often require the balancing of equities. *Id.* Although "[a]ccountability for benefit received is a core characteristic of restitution law," it is also true that "what constitutes a 'benefit' is at times a perplexing problem on which judgments may differ." Restatement 2d, Restitution § 1, *Underlying Principles of Restitution,* at 14, 23 (Tent. Draft No. 1, April', 1983). "[T]here is an independent principle that the receipt of gain is not unjust enrichment to the extent that the recipient generated it by his own rightful contribution of effort, capital or skill." *Id.* "In application, the principle [of benefit conferred through mistake] may require restitution of part of an amount paid, not the whole, and may require the correction rather than the avoidance of a transfer." *Id.* § 5, at 58.

The record before us does not contain facts that would allow us to balance the equities of the situation. The record does not show the State's costs of recovery or the percentage of the recovery "generated" by the State's "own rightful contribution of effort, capital or skill." *Id.* § 1, at 23. It does not show what percent of the setoff money, if any, the federal defendants will, in fact, return to the State in the future, *i.e.,* the costs to the State of having the recovered money set off against current accounts but applied to future "unobligated" or "unprogrammed" accounts. Neither does it give us any basis to determine what percentage of the settlement money the State should be permitted to retain as an *incentive* to pursue on behalf of the federal government as well as itself and recover from bid riggers the federal as well as the state share of project costs. We, therefore, must remand the case to the District Court to weigh and balance the equities concerning the precise amount of the federal share the state should be permitted to retain and precise amount it owes to the federal government as restitution. Until the District Court concludes this process, it may continue its injunction preserving the status quo in effect.

VI.

It is clear that the doctrine of equitable estoppel—based in this case on the conversation between the State Attorney General and antitrust Assistant Attorney General Litvack—is no bar to recovery or setoff of the federal share by the defendants. In the first place, the equitable estoppel argument is misplaced here because Litvack did not specifically address the question of recovery of the federal share by federal road officials under the Highway Act. He was talking about federal recovery from the bid riggers under the antitrust laws. Even if this were not the case, "it is well settled that the government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford County, Inc.*, ____ U.S. ____, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984). The doctrine of equitable estoppel does not apply here, just as it did not apply in *Heckler,* because the only "detriment" to the party asserting estoppel against the government is simply its "inability to retain money that it should never have received in the first place." *Id.* 104 S.Ct. at 2225. Not only must businessmen and administrators, as Justice Stevens reminds us in *Heckler,* quoting from Holmes, "turn square corners when they deal with the government," they may not bend the government's mistake into a windfall for themselves. *Id.* 104 S.Ct. at 2225 quoting from *Rock Island R.R. Co. v. United States,* 254 U.S. 14, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920). They may not use the government's error as an angle to enrich themselves.

Accordingly, the judgment of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

No. 83-5499

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Tennessee, et al.,
Plaintiffs-Appellees,

v.

U. S. Department of Transportation, et al.,
Defendants-Appellants.

BEFORE: MERRITT and JONES, Circuit Judges and BELL*,
United States District Judge

ORDER

(Filed Jan. 21, 1985)

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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* Honorable Sam H. Bell sitting by designation from the Northern District of Ohio

APPENDIX C

State of Tennessee ex rel. William M. Leech, Jr.,
Attorney General and Reporter

v.

Elizabeth H. Dole in her official capacity as Secretary, United States Department of Transportation; R. A. Barnhart, in his official capacity as Administrator, Federal Highway Administration, United States Department of Transportation; and E.G. Oakley, Division Administrator, Federal Highway Administration, United States Department of Transportation.

No. 3-83-0046.

United States District Court for the
Middle District of Tennessee,
Nashville Division.

May 18, 1983.

MEMORANDUM

John T. Nixon, District Judge.

The State of Tennessee through its Attorney General and Reporter, William M. Leech, Jr., filed this action on January 13, 1983 against the Secretary of the United States Department of Transportation, Elizabeth H. Dole, (the Secretary) and the Administrator and Division Administrator of the Federal Highway Administration, R.A. Barnhart and E.G. Oakley, respectively, seeking a declaratory judgment and injunctive relief. At issue is whether the defendants have any Congressional or Constitutional authority to withhold or debit any amount of monies against the State's account with the Federal Highway Administration (FHWA) because of the State's recovery of overcharges due to bid-rigging on Tennessee highway construction projects awarded under the Federal-Aid

Highway Act of 1956, as amended, 23 U.S.C. §§ 101, *et seq.* (the Highway Act). This Court has jurisdiction by virtue of 28 U.S.C. § 1331(a), this case arising under Article I, Section 8 of the United States Constitution and the Highway Act. This Court also has jurisdiction pursuant to 28 U.S.C. § 1361 because the State seeks to compel the Secretary and her agents to properly perform their duties under federal law. Venue lies in this District under 28 U.S.C. § 1391(e).

By agreement of the parties, the trial on the merits of this action was consolidated with the State's motion for preliminary injunctive relief and a hearing was held on April 28, 1983. Fed.R.Civ.P. 65(a)(2). The Secretary further agreed to withhold taking any action on the State's billings under the Highway Act pending this Court's decision. The parties submitted the case to the Court based on the pleadings and documentary evidence, objecting only to relevance of certain documents. Pursuant to Fed.R.Civ.P. 52(a), this Memorandum contains the Court's findings of fact and conclusions of law.

I.

The parties do not dispute that in 1979, the United States Department of Justice and a federal grand jury commenced an investigation of possible bid-rigging on highway construction projects let for competitive bidding by the State under the Highway Act. This investigation included companies and persons in Tennessee. As a result of the investigation, criminal proceedings were initiated against numerous firms and persons identified as involved in collusive bidding on highway construction projects let by Tennessee under the Highway Act. More than seventy firms and individuals were convicted of bid-rigging in violation of either the Sherman Antitrust Act, 15 U.S.C. § et seq., or the federal mail fraud statute, 18 U.S.C. § 1341 et seq. Most of these convictions in Tennessee were obtained by guilty plea agreements between the United States and the defendants named in the criminal actions. The federal guilty pleas usually

included a pledge by the convicted firms and persons to cooperate with the United States in its on-going investigation of bid-rigging on highway construction projects. *See e.g.*, Information Petition to Enter Guilty Plea and Guilty Plea Agreement in *United States v. Burns & Baker & J.H. Burns*, No. 80-30142 (M.D. Tenn. 1980), State's Exh. B. Upon conviction in federal court the FHWA Administrator debarred or disqualified the convicted firm for a period of time from employment on federally funded FHWA projects. State's Exh. D and Secretary's Exh. 7. If a convicted firm agreed to cooperate with federal authorities the FHWA Administrator, in several instances, reduced the firm's debarrment period thereby acknowledging the firm's cooperation. *Id.* State's Exh. D and Secretary's Exh. 7.

It is uncontroverted, and the documentary evidence establishes that the State's civil investigation resulted in certain settlement agreements.[1] These settlement agreements involved disputed claims of injuries suffered by the State because of collusive bidding in violation of the Federal and State Antitrust Laws. 15 U.S.C. §§ 1 and 15; Tenn.Code Ann. §§ 69-101, *et seq.* The settlement agreements expressly stated that the settlement represented a compromise and release only of the claims of the State. State's Exh. E.

During the course of the State's investigation, Sanford M. Litvack, Assistant Attorney General, United States Department of Justice, Antitrust Division, from January 1980 to March 1981, advised General Leech as to the Department's legal position on claims for recovery of overcharges due to bid-rigging on highway construction projects under the Highway Act. In his undisputed affidavit, Mr. Litvack states that he supervised the

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[1] The Secretary admits that the State requested information relative to bid-rigging on State highway construction projects, during the course of the State's investigation. However, disclosure of this information was restricted due to the pendency of federal grand jury proceedings and Fed.R.Civ.P. 6(e).

Antitrust Division's litigation involving bid-rigging and prosecutions in Tennessee and that in 1980 the Divison's position was "that only the State was injured in its property by reason of bid-rigging on such highway construction projects and that the United States had no legal claim or interest in such recoveries under the federal antitrust laws." He further stated, "The Division's legal position had been previously stated in litigation in Illinois involving suits to recover overcharges due to bid-rigging on highway construction projects awarded by the State of Illinois under the [Highway Act]. Those cases were *State of Illinois v. Brighton Construction Co., et al.*, and *United States v. Azzarelli Construction Co., et al.*" Litvack Affidavit, Exh. G. Mr. Litvack's assertion on September 10, 1980 to General Leech that the United States had no interest in Tennesse's efforts to recover any overcharges due to bid-rigging on highway construction projects under the Highway Act is supported in the briefs of the Unite States in the *Brighton* and *Azzarelli* cases.

Brighton involved an action brought by Illinois to recover damages under the Clayton Act, 15 U.S.C. § 15, against highway contractors who conspired to rig bids on highway construction projects. The defendants in *Brighton* moved to join the United States as an indispensable party under Fed.R.Civ.P. 19. When the district court granted the motion, the State of Illinois moved to reconsider and the United States filed a brief supporting Illinois' motion to reconsider. State's Exh. H. In that brief, the United States argued that only the State of Illinois was entitled to overcharges due to bid-rigging on projects let under the Highway Act.

> "The United States agrees with the State of Illinois that the United States is not a necessary party to this proceeding. In the case of the highway construction program at issue here, the State of Illinois may maintain an action for the entire injury flowing from the alleged antitrust violation pursuant to Section 4 of the Clayton Act. While federal funds financed the highway project at issue, those funds were

drawn from a fixed allotment to the State of Illinois set aside for that state's use in highway construction. Accordingly, in a federal funding program of this type, the state ultimately feels the effects of the overcharge by losing opportunities that it would have enjoyed but for the illegal overcharge. Allowing the state to sue under the Clayton Act for the entire overcharge, is supported not only by logic based on the particular state relations involved in the Federal Aid Highway Program but also by important policy considerations. Effective incentive to state antitrust enforcement and the deterrent value of the antitrust laws are served by deeming the state injured to the full extent of the overcharge for the Clayton Act remedy purpose in this case."

* * * * * *

"The issue here is whether for these purposes, the Federal Aid Highway Program more closely resembles a revenue sharing program or an unlimited payment program such as Medicaid. It is our position that the Federal Aid Highway Program bears a closer resemblance to revenue sharing than to Medicaid and accordingly the State of Illinois should be deemed injured to the full extent of overcharges for the purpose of the Clayton Act and should be permitted to recover the entire amount, treble."

* * * * * *

"When the cost of an approved project is inflated as a result of bid rigging, the state suffers the full effect of such inflation. The amount of federal funds available to it that year remains the same, but the amount of highway the state can purchase with those funds is reduced by the illegal overcharge. The state is forced to use up some of its federal road construction funds to pay the overcharges. This may cause it to trim its highway program accordingly or else use state funds. The state feels the pinch for the

> state's plans and projects are affected by the amount which the bidriggers have obtained as a result of their collusion."

State's Exh. H at 4-5, 8 and 10-11; MEMORANDUM OF THE UNITED STATES IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION at 5-5, 8 and 11, *Illinois v. Brighton Building & Maintenance Co., et al,* No. 77-C-4541 (N.D.Ill.).

Similarly, in the *Azzarelli* case, which was brought by the United States against several firms for bid-rigging, the United States maintained in its brief that

> [B]y the terms of the Federal Aid Highway program, a limited amount of federal funds is apportioned to each state each fiscal year. The state plans the highway projects it will undertake in light of this overall budgetary constraint. If the cost of one project is higher than expected due to bid rigging, this reduces the amount of funds available to the state for other projects that year. The state will be able to purchase less highway with the amount of money available to it. The federal government would pay more than was necessary on the one project as a result of bid rigging, but it would not be damaged overall since the amount of overcharge would be off set by the corresponding reduction in the amount of federal funds available for other state projects that year.

State's Exh. I at 5; GOVERNMENT'S MEMORANDUM IN OPPOSITION TO THE MOTIONS OF THE DEFENDANTS AND THE STATE OF ILLINOIS TO DISMISS THE COMPLAINT at 5, in *United States v. Azzarelli Construction Co.,* No. 79-3178 (C.D.Ill.). Thus, it appears that Mr. Litvack's representation to General Leech that the State alone was the proper party to recover any overcharges due to bid-rigging under the Highway Act was an accurate statement of the United States' position.

Because of the State's recovery of overcharges from firms engaged in bid-rigging on Tennessee highway construction projects, the defendant Oakley, on June 12, 1981, requested certain information so that the federal share of the sums recovered could be credited to the projects on which the alleged overcharges occrred. Oakley explained that this action would prevent the State from recovering twice for the overcharges; once under the Highway Act and again from the bid-riggers. State's Exh.F—Attachment A; Secretary's Exhibit 1. In a letter dated August 3, 1981, General Leech responded to Oakley's request for information stating that he could discern no legal basis for FHWA's claim for recovery of funds under the State's settlement agreements and citing *United States v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). Accordingly, General Leech denied Oakley's request for the settlement information.

Again, in a letter dated November 23, 1981 Oakley wrote the Tennessee Commissioner of Transportation requesting information needed to determine the federal pro rata share of settlement funds obtained by the State from bidriggers. State's Exh. F—Attachment B; Secretary's Exh. 2. General Leech responded by letter to Oakley's letter of November 23, 1981 on January 14, 1982, again denying Oakley's request for information based on the *Azzarelli* case.

Through yet another letter dated December 6, 1982 Oakley requested certain information from the State. Oakley advised the Commissioner of the Tennessee Department of Transportation that if Tennessee failed to cooperate in thirty (30) days, then FHWA would unilaterally recover its pro rata share of the settlement amounts. Oakley explained in this letter that:

> Pursuant to current FHWA policy when a State fails or refuses to comply with the terms of its project agreements and FHWA regulations by refusing to credit pro rata share of funds recovered, the FHWA Division Administrator is required to make a reasonable effort to identify the projects involved and inilaterally reduce the Federal-aid par-

> ticipation in all such projects by an amount sufficient to cover any possible restitution or refunds the State obtains, by deduction from unpaid vouchers.
>
> Consequently, if the requested information is not provided within the thirty days the Federal Highway Administration will be required to act unilaterally in deducting the appropriate funds from the current billing voucher. The Department's unobligated balances for the class of funds involved would then be adjusted to reflect the deductions made by these procedures. Conversely, should the Attorney General's Office agree to credit the appropriate Federal-aid projects the Federal share of the funds obtained from the negotiated bid-rigging settlements, such action would result in the credits being applied to TDOT's unobligated balance of Federal-aid highway funds and the funds would not be returned to the Federal Treasury.

State's Exh. F—Attachment C; Secretary's Exhibit 3. The rationale offered by Oakley for taking this action was that:

> Federal-aid highway funds can only be used to reimburse a State Highway Agency for properly attributable costs of construction actually incurred on a Federal-aid project. When funds are recovered from a contractor for restitution and compensatory damages, it is clear that the State's actual costs attributable to the Federal-aid project or projects covered by the agreement have been reduced; thus, a credit must be made to the project based on actual final costs. It is FHWA's position that credits to the appropriate Federal-aid projects are due on those Federal-aid projects which have been involved in restitution agreements and that detailed information concerning the computation of restitution and compensatory damages on these projects must be provided to FHWA upon request.

At the hearing, the Secretary clarified Oakley's December 6th letter explaining that when FHWA made deductions from Ten-

nessee's current billings that amount would be made available to Tennessee for other highways. Thus, Tennessee would not "lose any money, there is no harm". Transcript of Proceedings, April 28, 1983 at 15 and 20.

On April 8, 1983, the Tennessee Commissioner of the Department of Transportation received another letter from Oakley dated April 6, 1983. In this letter Oakley stated that FHWA had unilaterally determined that the federal pro rata share of the State's settlement fund was $4,500,290.00 and that this amount would be deducted from the State's next billings under the Highway Act. Oakley further explained that the sums subtracted could be restored to the unobligated balance of the Department's federal account by appropriate fiscal action. If the fiscal transactions were completed, the funds coud be reobligated on future federal-aid at the Department's discretion and subject to available obligational authority, State's Exh. F—Attachment 14.

The State contends in this lawsuit that the defendants attempt to recover a share of the State's recoveries of overcharges from the bid-riggers is without any legal or Congressional authorization. Specifically, the State maintains that FHWA has no legally protectable interest in the State's antitrust recoveries because (1) the settlement agreements relate only to overcharges suffered by the State and (2) the funds appropriated to FHWA are gifts; thus, the defendant suffered no monetary loss due to the bid-riggers only the State. The State strongly contends that neither the Secretary nor FHWA has any Congressional authority to withhold funds due to the State's recoveries from the bid-riggers. Alternatively, the State maintains that the defendants should be estopped from asserting any interest in the State's funds due to prior representations. Other arguments asserted by the State that need not be directly addressed are as follows: (1) the United States itself can pursue recovery of any overcharges owed to FHWA against the offending parties under 15 U.S.C. § 15(a); (2) the information requested by FHWA is sub-

ject to privileges against disclosure pursuant to Tenn.Code Ann. § 10-7-504(d)(1), (2), (3); and (3) even if lawful, the defendants' requests to Tennessee are premature as the State's enforcement activity has not yet concluded.

II.

When Congress enacted the Federal-Aid Highways Act, it found that the national interest would be served by the acceleration of the construction of the federal highway systems to serve local and interstate commerce and to enhance national and civil defense. 23 U.S.C. § 101(b); *State Highway Commission of Missouri v. Volpe,* 479 f.2d 1099, 1107 (8th Cir. 1973). In *State of Maine v. Goldschmidt,* 494 F.Supp. 93, 95-96 (D.Me.1980), Judge Gignoux succinctly explained how the Highway Act operates:

> The highway Act established a system of grants-in-aid to the States to finance a part of the cost of constructing highways in the Federal-aid highway system. 23 U.S.C. § 103. For Interstate projects, the amount of the federal contribution is, in most cases, 90%; for primary, secondary and urban projects, 75%; and at other rates for other categories of projects. 23 U.S.C. § 120. The Act is administered by the Secretary through the Federal Highway Administration (the FHWA). The Act provides for a complex funding method. Congress authorizes the expenditure of funds for each fiscal year (October 1—September 30) in periodic appropriations acts. *See* note fol. 23 U.S.C. § 101. At the beginning of each fiscal year, the Secretary apportions the annual authorization of funds from Congress among the States in accordance with a formula set forth in 23 U.S.C. § 104(b). Upon apportionment, each State is notified of its share of the national authorization. Once apportioned to a State, the apportioned amount is for its exclusive use, and may be "carried over" for one additional fiscal year (Interstate authorizations) or for three ad-

ditional fiscal years (non-Interstate authorizations). 23 U.S.C. § 118(b). The apportionment for the current fiscal year, together with its "carry-over" apportionments from prior years, constitute the State's available apportionment at the beginning of the year. The States must follow the statutorily prescribed procedure to receive federal grants. At the beginning of each fiscal year, the State submits for FHWA's approval a program of projects for which federal funds are desired. *Id.* § 105. If FHWA approves the program, the State submits specific projects for approval. *Id.* § 106(a). FHWA approves those projects meeting the requirements of 23 U.S.C. 106(a). Approval of an individual project creates a contractual obligation of the United States to pay the federal share of the cost of constructing the project. *Id.* Upon project approval, the State is permitted to obligate the apportioned funds by entering into construction contracts. The State then is reimbursed for actual expenditures as it submits vouchers for work completed. The required funds are paid out of liquidating appropriations, provided by annual appropriations acts. Thus, an obligation created in one year normally has actual expenditure impact on the federal budget in ensuing fiscal years.

In addition to its annual authorization for appropriation, Congress sets a limit on the total amount of the apportioned budget authority which may be obligated by the States in each fiscal year. This "obligation of authorized funds nationwide, and this ceiling", rather than the total of the States' unused apporitonments, becomes the constraint on the national program.

Although this Court adopts Judge Gignoux's explanation of the Highway Act, several aspects of the Act's funding procedure require special emphasis and are important to the resolution of this case. In this regard, the Court has drawn heavily from a publication of the U.S. DEPARTMENT OF

TRANSPORTATION, FINANCING FEDERAL—AID HIGHWAYS (1979). *See also* Figure I Financial Procedures (Contract Authority Programs).

First, the Federal highway program is a reimbursable program; that is, what is apportioned to the States is *not* cash but obligation authority. The States must provide the initial cash to begin a certain highway project but progress payments are permitted. 23 U.S.C. § 110. Ordinarily, after a highway project has been approved the contractor begins work and the State makes payments to the contractor. The State then submits vouchers to FHWA for review and approval. Upon approval of the vouchers, they are transmitted to the United States Treasury Department and, then, the Treasury Department credits to the State's bank account the federal share of a highway project's cost. FINANCING FEDERAL—AID HIGHWAYS, *supra,* at 18-19.

Second, the key step in the Highway Act financing is obligation, which represents the Federal government's commitment to reimburse a State for the federal share of a State's highway construction project. The FHWA administrators—such as the defendants Barnhart and Oakley—have been delegated authority to enter contractual agreements that obligate the United States. Obligation is the key step because obligated funds are considered "expended" even though no cash is transferred. Moreover, when funds are obligated, they cannot lapse. The obligation process is the last step in the financing process that the Federal government can control. *Id.* at 22 and 24.

Third, the availability of funds under the Highway Act is directly related to the available obligation authority. Ordinarily, there are funds remaining—unused parts of previous apportionment—old obligation authority that is combined with new obligation authority, which makes up the total available obligtion authority for a State. This situation arises because the availability of Highway Act funds for use does not terminate at

the end of a fiscal year. Interstate funds are available for two years, from one year in advance of the fiscal year for which they are apportioned until the end of the fiscal year authorized. 23 U.S.C. § 104(b)(5)(A); 23 U.S.C. § 118(b). Highway Act funds for non-Interstate purposes are available for three years after the close of the fiscal year for which such sums are authorized. 23 U.S.C. § 104(b); 23 U.S.C. § 118(b). Thus, non-Interstate funds are available for four years. A State's failure to obligate its funds within the specified statutory period—two years for Interstate funds and four years for non-Interstate funds—results in the lapse of its authority to obligate funds. When funds lapse, they are no longer available to the State.[2] Of course, when funds

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[2] The Secretary has consistently represented to the State and this Court that if the State provided FHWA the information requested the Federal pro rata share of the State's recoveries from the bid-riggers would be credited to Tennessee's unobligated account with FHWA. As explained by the Assistant United States Attorney at the hearing, it is "ironic that the only harm that Tennessee can suffer is if they continue to follow the Attorney General's Department of Transportation's position and refuse to credit back to the Federal Government, the Highway Administration, the Federal share of their recoveries. If they follow what we have suggested that they do, which seems to be provided by the code and by the regs, the four and a half million dollars that Mr. Oakley has identified will be credited to the State's unobligated balance with is then available to be used by the State for its current billings or for other projects that ultimately are approved. The State does not lose any money unless they continue to do as they have." Transcript of Proceedings at 11. *See also Id.* at 15 and State's Exh. F at 14-15, Attachment D; Secretary's Exh. 10. This Court questions the Secretary's authority to provide obligation authority to Tennessee for funds recovered from the bid-riggers because at least a portion of the recovered funds were originally awarded in 1976. By operation of 23 U.S.C. § 118, therefore, at least some of the obligation authority for these funds has lapsed and the Secretary has no statutory basis to make these funds available to Tennessee. Thus, the Secretary and FHWA appear erroneously to claim that the State will not be injured if it provides the information needed so that the Federal pro rata share may be caluclated. The Secretary and FHWA cannot act to Tennessee's favor or injury without specific statutory authority from Congress.

lapse no money is returned by the State, but only obligation authority. An exception to the lapsing provision is when Interstate funds lapse they may be allocated to other States. 23 U.S.C. § 118(b). *See* U.S. DEPARTMENT OF TRANSPORTATION, FINANCING FEDERAL—AID HIGHWAYS at 18-19, 22-27 & 56 (1979).

III.

The State has properly focused on the central question underlying this lawsuit, that being whether the funds obtained by the State through the Highway Act are State funds or federal funds. If the funds appropriated under the Highway Act are federal funds, then the State recovered Federal funds from the bid-riggers. conversely, if the Highway Act in fact provides funds to Tennessee that become State funds, then clearly the State recovered its own funds from the bid-riggers. It is the opinion of this court that by operation of the Highway Act, the funds at issue in this case are State funds.

As previously explained, the critical feature of the Highway Act is the obligation procedure, whereby the federal government commits itself to reimburse a State for a certain percentage of the cost of a highway project. 23 U.S.C. §§ 106(a) and 118. However, even before highway funds are obligated to a specific highway project, when highway funds are apportioned, they are controlled by the State. This conclusion is compelled by the language in 23 U.S.C. § 118, which provides, in part:

> (a) On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior Acts, such sums shall be available for expenditure under the provisions of this title.

In *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099, 1110 n. 15 (8th Cir.1973), the Court addressed the issue of

whether the States have any vested interest in funds appropriated under the Highway Act before a specific highway project is approved by the Secretary. Although the Court found it unnecessary to address this issue directly, the Court stated that "a reasonable construction of Section 118a) is contrary to the Secretary's argument that the states have no inchoate interest whatsoever in the funds so apportioned." The *Volpe* Court reasoned that 'the mandatory language in § 118(a)—"shall be available for expenditure"—indicates that the states have the power to obligate funds apportioned under the Highway Act. *Id.* Similarly, in *United States v. Azzarelli Construction Co.*, 647 F.2d 757, 760 n. 4 (7th Cir.1981), the Court recognized, without expressing any opinion, the argument that Highway Act funds become state funds and are expended at the time of their apportionment under § 118(a). This Court concludes that when the Secretary makes an apportionment of funds subject to obligation by a State, those funds cease to be Federal funds and become State funds. 23 U.S.C. § 118(a).

Additional statutory support for this Court's conclusion that after apportionment funds administered under the Highway Act are State funds is found in 23 U.S.C. § 118(b). That statute provides, in relevant part:

> (b)(1) Sums apportioned to each Federal-aid system (other than the Interstate System) shall continue available for expenditure in that State for the appropriate Federal-aid system or part thereof (other than the Interstate System) for a period of three years after the close of the fiscal year for which such sums are authorized and any amounts so apportioned remaining unexpended at the end of such period shall lapse.
>
> (2) Except as otherwise provided in this subsection, sums apportioned for the Interstate System in any State shall remain available for expenditure in that State for the Interstate System until the end of the fiscal year for which authorized. . . .

* * * * * *

> (4) Sums apportioned to a Federal-aid system for any fiscal year shall be deemed to be expended if a sum equal to the total of the sums apportioned to the State for such fiscal year and previous fiscal years is obligated. Any Federal-aid highway funds released by the payment of the final voucher or by the modification of the formal project agreement shall be credited to the same class of funds, primary, secondary, urban, or interstate, previously apportioned to the State and be immediately available for expenditure.

These provisions indicate that once funds are apportioned to a State, they are available for the State's exclusive use and if not used may be carried over for one additional fiscal year if Interstate funds or for three additional years if non-Interstate funds. *State of Maine v. Goldschmidt,* 494 F.Supp. 93, 95 (D.Me.1980). Thus, the Federal government loses control of funds once apportioned to a State, 23 U.S.C. § 118(b), and only that State can determine how those funds are spent.

Other courts that have examined the Highway Act funding procedure have found that the Highway Act funds are State funds in the nature of a gift to the State. In *D.R. Smalley & Sons v. United States, 372 F.2d 505 (Ct.Cl.1967), cert. denied,* 389 U.S. 835, 88 S.Ct. 45, 19 L.Ed.2d 97 (1967), the plaintiff sought to recover damages from the United States and the State of Ohio on the basis of a contract between Ohio and the plaintiff for construction of a highway under the Highway Act. The court of Claims dismissed the case as to the United States because of the lack of privity of contract. The Court rejected the plaintiff's theory that liability could be imposed on the United States because it required the highway construction to meet certain standards for reimbursement by the United States under the Highway Act. The Court reasoned that

> The National Government makes many hundreds of grants each year to the various states, to municipalities, to schools and colleges and to other public organizations and agencies for many kinds of public works, including roads and highways. It requires the projects to be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted. *See Mahler v. United States,* 306 F.2d 713, 716-722 (3rd cir. 1962), *cert. denied,* 371 U.S. 923, 83 S.Ct. 290, 9 L.Ed.2d 231. These grants are in reality gifts or gratuities.

Id. at 507. *Accord Somerville Technical Services v. United States,* 640 F.2d 1276, 1280-81 (Ct.Cl.1981); *Correlated Development Corp. v. United States,* 556 F.2d 515, 522-23 (Ct.Cl.1977). Similarly, in *State of Illinois v. Champaign Asphalt Co., slip op.,* No. S-Civ.-73-216 (S.D.Ill. December 1, 1971), the Court held that the United States was not an indispensible party under Fed.R.Civ.P. 19(a) in a case where the State of Illinois sought to recover damages for bid-rigging on highway construction projects under the Highway Act. The *Champaign Court relied on the Smalley* Court's holding that the federalunding under the Highway Act is a gift and that the State of Illinois was the real party in interest; the Court further explained that the "fact of federal funding neither minimizes injury suffered by the State nor relegates the State to a role of recovering damages on behalf of the Federal Government in the same proportion as the federal contribution." *Id.* at 8. Implicit in the conclusion of the Courts in *Smalley* and *Champaigne* was the recognition that the United States no longer has a legal interest in Highway Act funds once apportioned to a State.

The State's determination of how funds are spent obviously must comply with Highway Act requirements. If a State satisfies all applicable statutory requirements, then the United States through the FHWA administrator will approve a particular highway project which obligates the Federal government to

reimburse the State. 23 U.S.C. § 106(a). At this point, the Federal Government is contractually committed to provide financing for a highway construction project. 23 U.S.C. § 120. *See State of Vermont v. Goldschmidt,* 638 F.2d 482, 483 (2d Cir.1980). This contractual commitment on behalf of the Federal Government was recognized in *United States v. Azzarelli Construction Co.,* 647 F.2d 757, 760 n. 4 (7th Cir.1981), as the "vested right" theory. Under this theory, funds are expended and considered State funds when the Secretary approves a construction project.

For purposes of this case, it is clear that regardless of whether the Highway Act funds became State funds when apportioned by the Secretary under 23 U.S.C. § 118(a) or when the Federal Government became contractually committed pursuant to 23 U.S.C. § 106(a), the funds reimbursed to Tennessee when it paid the bid-riggers were state funds. The Federal Government lost all legal interest in the funds to the State.[3] Consequently, only the State of Tennessee has a legal interest in the funds at issue in this case.

Having determined that only the State of Tennessee has an interest in the Highway Act funds at issue, it naturally follows that only the State was injured by the illegal bid-rigging on highway projects let by the State. In *United States v. Azzarelli Construction Co.,* 647 F.2d 757 (7th Cir.1980), the United States sought recovery under the False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1976), and the Clayton Act, 15 U.S.C. § 15(a) 1976, for overcharges due to bid-rigging on highway construction projects in the State of Illinois. The *Azzarelli* Court affirmed the district court's dismissal of the case reasoning that the Federal

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[3] Counsel for the Secretary at the hearing implicitly recognized that the monies involved in this case belong to the State. In response to the Court's questions, Mr. Billet indicated that by statutory formula Tennessee receives a fixed obligation limit that is available to Tennessee for projects. As Mr. Billet stated, "It's Tennessee's money to start with, they weigh the contract.". Transcript of Proceedings at 20.

Government did not suffer an injury. *Id.* at 758 n. 1 and 761. The Court explained that because the Federal Government contributed a fixed sum to the State for highway construction, it was insulated from any overcharges. *Id.* at 761. The Court recognized, as the Secretary contends in this case, that because of the overcharges the Federal Government contributed more to the construction projects than the actual cost. Nevertheless, the *Azzarelli* Court held that this "did not affect the Government's overall contribution to Illinois," *Id.* at 761, primarily because under the Highway Act a state is apportioned a fixed and determinate amount which cannot be exceeded. The Federal Government's contribution to a construction project does not change because "the Government is contractually obligated to pay the State the appropriate Federal contribution once the project is approved. 23 U.S.C. § 106 (1976)." *Id.* at 762 n. 5.

This Court agrees with *Azarelli's* analysis that the Federal Government suffers no injury when the bid-riggers inflated the costs of a construction project. To be sure, Highway Act funds apportioned to the State were used at an increased rate. It was the State that was injured, however, because it lost the opportunity to use those funds on other highway projects. *Azzarelli* is neither an aberration, as suggested by the Secretary, nor is it based on a misconception of the Highway Act, as suggested by at least one bureaucrat. Secretary's Exh. 6. Except for the present case, the United States has consistently taken the position, in similar cases, that it was not injured because of collusive bid-rigging increasing the federal contribution to a State project. *See, e.g., State of Missouri v. Stupp Brothers Bridge & Iron Co.,* 248 F.Supp. 169, 175-76 (W.D.Mo.1965) and Brief of the United States in *State of Illinois v. Brighton Building & Maintenance Co.,* No. 77-C-4541 (N.D.Ill.), State's Exh. H. Neither is *Azzarelli* based on a misunderstanding of the Highway Act, given that the Secretary's own publication states that the Secretary shall apportion Highway Act funds to the states based on a statutory formula. 23 U.S.C. § 104. U.S. DEPARTMENT OF TRANSPORTATION, FINANCING

FEDERAL—AID HIGHWAYS at 16. Thus, this Court finds *Azzarelli* convincing and, therefore, controlling in this case. *See, e.g., Maple v. Citizens National Bank & Trust Corp.*, 437 F.Supp. 66, 68-69 & n. 5 (W.D.Okl.1977).

IV.

Attempts by the Secretary to withhold, impound or limit funding to the States under the Highway Act are familiar to federal courts. *See, e.g., State of Iowa v. Brinegar*, 512 F.2d 722 (8th Cir. 1975); *State Highway Commissioner of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *State of Maine v. Goldschmidt*, 494 F.Supp. 93 (D.Maine 1980). The constitutional and statutory limits of the Secretary's authority were defined and explained in *Volpe*. In that case the Court considered the issue of whether President Johnson had authority under the Highway Act to direct the Secretary to withhold $3 billion in highway project obligations for inflation and budgetary purposes in fiscal year 1967. The *Volpe* Court held that absent some specific statutory provision in the Highway Act, the Secretary does not have any express or implied authority to withhold authority to obligate apportioned Highway Act funds. *Volpe*, 479 F.2d at 1118. *See also Pennhurst State School v. Halderman*, 451 U.S. 1, 17-18, 101 S.Ct. 1531, 1539-40, 67 L.Ed.2d 694 (1981).[4]

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[4] *But see Commonwealth of Pennsylvania Department of Transportation v. United States*, 643 F.2d 758 (Ct.Cl.), *cert. denied*, 454 U.S. 826, 102 S.Ct. 117, 70 L.Ed.2d 101 (1984), where the Court notes that neither the State of Pennsylvania nor the United States cited any authority requiring the United States to reimburse unforeseen costs on construction projects. The United States, however, conceded that it had a policy of reimbursing unbudgeted settlement costs. *Id.* at 762.

The *Volpe* Court analysis considered the constitutional and statutory issues presented. The Court found that the Constitution under Article I, § 8 granted only Congress authority to build roads or otherwise dictate the standards for highway construction. Until Congress acted, the Executive branch had no authority to affect the national highway system. Thus, the Secretary's authority was clearly limited to the terms of the statute Congress enacted. Turning to the Highway Act, *Volpe* noted that Congress enacted a "coherent scheme of statutory duties" to the Secretary. 479 F.2d at 1112. The Highway Act permits the Secretary to exercise discretion to approve or disapprove a construction project, but she must "act within the *specific* direction relating to efficiency, safety and overall compliance with the Act itself." *Id.* (emphasis in original). The *Volpe* Court further found that "Congress did contemplate that the Secretary exercise administrative expertise to see that the apportioned funds are not expended on projects which fail to meet *reasonable* standards of cost". *Id.* (emphasis in original). Nevertheless, Congress specifically authorized the Secretary to withhold obligation authority only if the Secretary of the Treasury determines there would be insufficient funds. The Court then held that there is nothing within the Act which "explicitly or impliedly allows the Secretary to withhold approval of construction projects for reasons remote and unrelated to the Act." *Id.* at 1114. Thus, the *Volpe* Court's holding is based upon the constitutional authority vested in Congress and as expressed by Congress through the Highway Act.

Both parties have at least implicity recognized the mandate in *Volpe*—that specific Congressional authority is required for the Secretary to recover the Federal pro rata share of the State's bid-rigging recoveries. The Secretary argues that her authority is rooted in 23 U.S.C. §§ 110, 112, 114, 120 and 121. SECRETARY'S BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF at 21. Subsequent to the hearing, the Secretary has

raised additional arguments to justify her action. First, the Secretary contends that Tennessee has "an affirmative duty under the [project agreements] to recover bid-rigging as well as any other project overcharges". SECRETARY'S SUPPLEMENTAL BRIEF IN RESPONSE TO PLAINTIFF'S REPLY BRIEF at 3. Second, the Secretary argues that FHWA has discretion to recover the Federal pro rata share of bid-rigging recoveries because the State refused to provide FHWA with information to calculate the federal share. Because the State has an affirmative duty to recover the bid-rigging overcharges, the Secretary maintains that the FHWA administrator has discretion to withhold federal funds when the State refused to provide the defendants Barnhart and Oakley the information requested. The Secretary characterizes her actions as specific performance—requiring the State to comply with federal law and regulations. *Id.* at 4-6. The Secretary relies on a variety of regulations including 23 C.F.R. §§ 1.3, 1.4, 1.9, 1.28, 1.31 and 1.36. *Id.* at 2.

As expected, the State disagrees and maintains that there is no statutory provision imposing an affirmative duty to collect overcharges because of bid-rigging. STATE'S SUPPLEMENTAL REPLY BRIEF at 5. The State further contends that FHWA regulations do not impose and cannot impose an affirmative duty on the State to recover bid-rigging overcharges. *Id.* at 6. The State insists that *Volpe* requires that the Secretary be enjoined from taking any action to withhold the State's Highway Act funds because there is no specific statutory provision authorizing the Secretary's actions.

Upon review of the statutory and regulatory provisions cited by the Secretary and after applying the *Volpe* standard, this Court agrees with the State that the Secretary has not been authorized by Congress to withhold Highway Act funds due to the State's bid-rigging recoveries. Neither does this Court find that either the Highway Act or its regulations create an affirmative duty on the State to recover bid-rigging overcharges.

Thus, this Court concludes that the Secretary lacks authority to withhold Highway Act funds from Tennessee in the present case.

In reviewing the statutory provisions relied on by the Secretary the Court is guided by the traditional rule of statutory interpretation that a statute must be construed as a whole and that a particular section should not be read in isolation of the remainder of the statute. *Volpe,* 479 F.2d at 1111-12. *See also, Pennhurst State School,* 451 U.S. at 18-19, 101 S.Ct. at 1540-1541. While the Secretary may suggest that a particular section of the Highway Act provides the needed Congressional authority, this Court must construe that section within the whole statutory scheme. Moreover, this Court's review of the Highway Act is for the purpose of ascertaining a specific statutory provision justifying the Secretary's actions in the present case.

The Secretary's reliance on 23 U.S.C. § 110 is misplaced. This section requires the execution of a project agreement between the State highway department and the Secretary after the necessary plans for a construction project are approved. While the section requires that the State's pro rata share of a construction project be included in the project agreement, there is no mention of the federal government's share. Execution of a project agreement commits FHWA to a particular construction project, but noting in § 110 addresses the issue of whether the Secretary is authorized to recover from the State overcharges due to bid-rigging.

Next, the Secretary argues that under 23 U.S.C. §§ 112 and 114, the letting and administration of federal-aid contracts is the State's sole responsibility. Additionally, the Secretary contends that FHWA is authorized to reimburse the State only for the actual costs of a construction project under 23 U.S.C. §§ 120 and 121. The Secretary further argues that when there is collusive bidding that inflates the costs of a construction project, clearly the federal reimbursement is higher than actual cost. Conse-

quently, FHWA being required to reimburse only actual cost must recover from the State the overcharge. The Secretary in this regard also maintains that if the State shirked its responsibility to recover the overcharge due to bid-rigging, then the State would be liable. SECRETARY'S BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF at 21-22.

Initially, the Court notes that the focus of § 112 is to require the State to let highway construction projects after competitive bidding. Toward the goal of competitive bidding, § 112(c) requires an anti-collusion affidavit from the contractor that in fact is the low bidder that receives a construction project. This anti-collusion affidavit certifies that the contractor has not "either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract." 23 U.S.C. § 112(c). The anti-collusion affidavit is incorporated by reference into every project agreement. Section 114, the Secretary correctly argues, authorizes the State highway department to supervise actual construction of a highway project.

The State has the duty to guarantee compliance of the competitive bidding requirements imposed under § 112. In rejecting the United States' argument that it was injured because of a contractor's bid-rigging, the Court in *Azzarelli* stated that not only was the Government contractually obligated to reimburse the State for the federal share of a project's cost, but § 112 imposed no duties on the contractors but on the State. *Azzarelli,* 647 F.2d at 762 n. 5. If the State fails to comply with the competitive bidding requirements in § 112, then the Government may withhold approval and payment of a construction project. The Government, however, could not withhold its contribution based on a violation of § 112 by the contractor due to bid-rigging. *Id.* In this case, the Secretary does not claim that Tennessee violated § 112. Thus, neither §§ 112 or 114 provide any

Congressional authorization for the Secretary to withhold Highway Act funds from Tennessee due to its recoveries of overcharges from bid-riggers.

As to the Secretary's argument that FHWA is required only to pay the actual cost of construction, the Court discerns no statutory basis in 23 U.S.C. §§ 120 and 121 to withhold from Tennessee Highway Act funds because of the State's recoveries from the bid-riggers. Accepting the Secretary's interpretation of §§ 120 and 121 that the federal pro rata share and payment of the federal share of a particular construction project is fixed by statutory formula, neither of these sections in any way suggest that the Secretary can withhold future funds if it is determined that past federal payments exceeded statutory limits. Simply stated, recoupment by the Secretary from a State because the federal share exceeded §§ 120 and 121, it appears, was not envisioned by Congress. Thus, because Congress has the entire constitutional authority over interstate roads, it is clear Congress has not authorized the Secretary to withhold funds under the facts of this case.

Moreover, it is abundantly clear that the Secretary has not cited to this Court a single statutory provision that even remotely suggests that the State has an affirmative duty to seek recovery of overcharges from the bid-riggers.[5] The Secretary's suggestion that Tennessee would be liable if it failed to recover overcharges from the bidriggers is erroneous. For purposes of the Highway Act, it is well established that Tennessee is not an agent of FHWA or the Federal Government. *Eden Memorial*

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[5] To the extent that the defendants argue that they have authority to demand a share of Tennessee's recoveries based on the opinions of the United States Comptroller General, Secretary's Exh. 4 and 5, this Court does not find those opinions persuasive because the Comptroller General does not cite any statutory provisions enacted by Congress authorizing the defendants' actions in this case. Consequently, those opinions are not relevant to the constitutional and statutory issues presented.

Park Association v. United States, 300 F.2d 432, 439 (9th Cir. 1962); *United States v. Mattingly Bridge Co.,* 344 F.Supp. 459, 462 (W.D.Ky. 1972).

Given the Court's conclusion that there is no affirmative duty on Tennessee to recover overcharges from the bid-riggers, the Secretary's reliance on certain administrative regulations must fail. The Secretary argues that the FHWA administrator has discretion under 23 C.F.R. § 1.36 to invoke various administrative remedies. True it is that 23 C.F.R. § 1.36 provides authority to the FHWA Administrator to withhold payments and to take other appropriate action, this regulation applies only if a State fails to comply with or violates federal law or regulations. Because there is no statutory duty that Tennessee recover overcharges from the bid-riggers, there was no violation of federal law when Tennessee refused to provide FHWA the information requested to permit it to calculate the federal pro rata share of recoveries. In short, the FHWA Administrator has no discretion in this case, as permitted in § 1.36, because the Secretary has not shown any violation of federal law or regulations by Tennessee.

Neither does this Court find the regulations cited by the Secretary, specifically, 23 C.F.R. §§ 1.3, 1.4, 1.9, 1.28 and 1.31, applicable in this case. While 23 C.F.R. § 1.28(b) does require the State to furnish information requested by the FHWA Administrator, this regulation applies only when the Secretary finds a State has diverted Highway Act funds in violation of 23 U.S.C. § 126. That section makes it unlawful for a State to use funds for non-Highway Act purposes. In this case, there has never been any suggestion by the FHWA Administrators Barnhart and Oakley that Tennessee has violated § 126. Thus, this section does not apply.

The undisputed affidavit of Michael Shinn, State's Exh. K, establishes that the Tennessee Department of Transportation has received $6,192,073.81 from the State's antitrust settlements

with the bid-riggers. Of this amount, Mr. Shinn explains that $4,700,000.00 has been allocated to the State's general fund by legislative act of the Tennessee General Assembly. The Tennessee Department of Transportation has retained $1,492,074.81. Of this amount, the Transportation Department has apportioned $953,573.81 to the Department's fund balance for appropriation in future years and $538,500.00 has been apportioned to current revenues for financing current expenditures. It is clear from the Shinn affidavit as well as the State's Deputy Attorney General's statement at the hearing that Tennessee has used its recoveries from the bid-riggers for non-Highway Act purposes. Transcript of Proceedings at 26. To that extent, the State has clearly diverted Highway Act funds for purposes other than those outlined in the Highway Act. This Court disapproves of the Tennessee General Assembly's and Tennessee Department of Transportation's use of recovered Highway Act funds for purposes inconsistent with the Highway Act. In this case, however, the defendants do not base their decision to recover Highway Funds from Tennessee on 23 U.S.C. § 126; consequently, this section is not applicable.

Furthermore, for the reasons stated in Part V of this Memorandum, the Court finds that even if § 126 was applicable to this case, the undisputed facts of this case show that the defendants are equitably estopped from justifying their actions based on § 126. This, of course, only applies to those antitrust recoveries already recovered by the State, not those which the State may receive in the future. Thus, the defendants as trustee of the Highway Trust Fund under the Highway Act may recoup under § 126 Highway Act funds used for non-Highway Act purposes in the future.

V.

As an alternative holding, this Court is of the opinion that even if there was statutory authority for the Secretary and FHWA to recoup money from Tennessee and even if there was

an affirmative duty on Tennessee to recover the overcharges from the bid-riggers for itself and the Federal Government, the undisputed facts in this case mandate the application of equitable estoppel against the Federal Government. The State argues that estoppel is especially appropriate in this case not only because the traditional estoppel elements are present but also because of the defendants' affirmative misconduct and because the balance of interests favor Tennessee. The Secretary counters by asserting that not only has the State failed to establish the traditional estoppel elements but there was no affirmative misconduct by the defendants. This Court concludes that the elements of estoppel are present in this case and the Federal Government has clearly engaged in affirmative misconduct toward Tennessee that would make it fundamentally unfair for the defendants to recoup Tennessee's recoveries from the bid-riggers.

Although traditionally the doctrine of equitable estoppel as applied to the Government has not been favored, the doctrine has undergone "considerable development" and many courts have acknowledged and applied the doctrine against the Government. *Rogers v. Tennessee Valley Authority,* 692 F.2d 35, 37 (6th Cir. 1982). The Supreme Court has acknowledged the doctrine as applicable against the Government, but it has not defined the contours for application. *See, e.g., Schweiker v. Hansen,* 450 U.S. 785, 789, 101 S.Ct. 1468, 1471, 67 L.Ed.2d 685 (1981); *INS v. Hibi,* 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973); *Rogers,* 692 F.2d at 38. Generally, those courts that have applied the doctrine against the Government require that the traditional four estoppel elements be present in the case plus affirmative misconduct by the Government. *Rogers,* 692 F.2d at 37. The elements of estoppel are: (1) that the party to be estopped knows the facts; (2) that the party intends that his conduct be acted on or the party acts in a manner that the party asserting the estoppel has a right to believe that it is intended that the conduct be relied on; (3) that the party asserting estoppel be ignorant of the true facts; and (4) that the party asserting estoppel rely on the conduct to his injury. *United*

States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 248 (1979); *United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970). In addition to these four necessary elements of estoppel, when applied to the Government, there must also be an affirmative misrepresentation misconduct or concealment by the Government. *INS v. Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973); *United States v. Harvey*, 661 F.2d 767, 774 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 74, 74 L.Ed.2d 72 (1982); *Yang v. Immigration and Naturalization Service*, 574 F.2d 171, 175 (3rd Cir. 1978); *United States v. Ruby Co.*, 588 F.2d at 703-04. *Cf. Schweiker v. Hansen*, 450 U.S. 785, 788, 101 S.Ct. 1468, 1470, 67 L.Ed.2d 685 (1981).

Applying these principles to the instant case, the Court finds that all of the traditional estoppel elements are satisfied. First, the undisputed affidavit of Mr. Litvack clearly establishes that General Leech inquired on behalf of the State of Tennessee, concerning the interest of the United States in the State's recoveries of overcharges from the bid-riggers. Mr. Litvack represented to General Leech that the United States did not have any legal claim or interest in the State's recoveries. State's Exh. G. Mr. Litvack's representations are supported fully in the United States' briefs in the *Azzarelli* and *Brighton* cases. State's Exh. H and I.

Because Mr. Litvack was the Assistant Attorney General in the Antitrust Division, United States Department of Justice, when he informed General Leech of the United States' position in September 1980, he had authority to represent the United States. It is well-established that the Attorney General is the chief legal officer of the United States. In this capacity, and absent contrary congressional directive, he is vested with plenary power over all litigation to which the United States or an agency of the United States is a party. 28 U.S.C. §§ 516, 519; *ICC v. Southern Ry. Co.*, 543 F.2d 534, 535-36 (5th Cir. 1976). *See also Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d

668, 676 n. 1 (5th Cir. 1978). Moreover, it is clear that the Attorney General has unquestioned authority and a continuing duty to protect the public's interests. *See, e.g., Vitamin Technologists v. Wisconsin Alumni Research Foundation,* 146 F.2d 941, (9th Cir.), *cert. denied,* 325 U.S. 876, 65 S.Ct. 1554, 89 L.Ed. 1994 (1945). Congress has specifically empowered the Attorney General or his appointee to "attend to the interests of the United States" in a pending case in federal or state court or "to attend to any other interest of the United States". 28 U.S.C. § 517. Thus, Mr. Litvack, as an Assistant Attorney General, not only had the authority to represent the United States' position as to the State's recovery of overcharges, but he had the statutory duty to explain the public's interest in the matter. Mr. Litvack also had the authority to represent the position of the United States Department of Transportation. 28 U.S.C. §§ 516 and 517.[6]

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[6] Congress has authorized the Attorney General to conduct litigation and protect the national interests when the United States or an agency is involved. A broad grant of authority is provided in 28 U.S.C. § 516 which states that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." This section authorizes the Attorney General to act not only when the United States, an agency or officer of the United States is a party but also if they are merely "interested" in litigation in which they are not parties. Additionally, a further grant of authority is given to the Attorney General in 28 U.S.C. § 517, which authorizes the Attorney General to protect the interests of the United States in federal and state court as well as "to attend to any other interest of the United States". When these two sections are combined—28 U.S.C. §§ 516 and 517—it clearly appears that Mr. Litvack had clear Congressional authority to present and to state to General Leech what, if any, interest the United States had in the State's investigation and prosecution of the bid-riggers. It is critical to recognize that when Mr. Litvack spoke he represented the interests of the United States, including the Federal Department of Transportation and FHWA. Absent contrary proof or Congressional directive, Mr. Litvack's statements must be deemed by this Court as true, correct and binding.

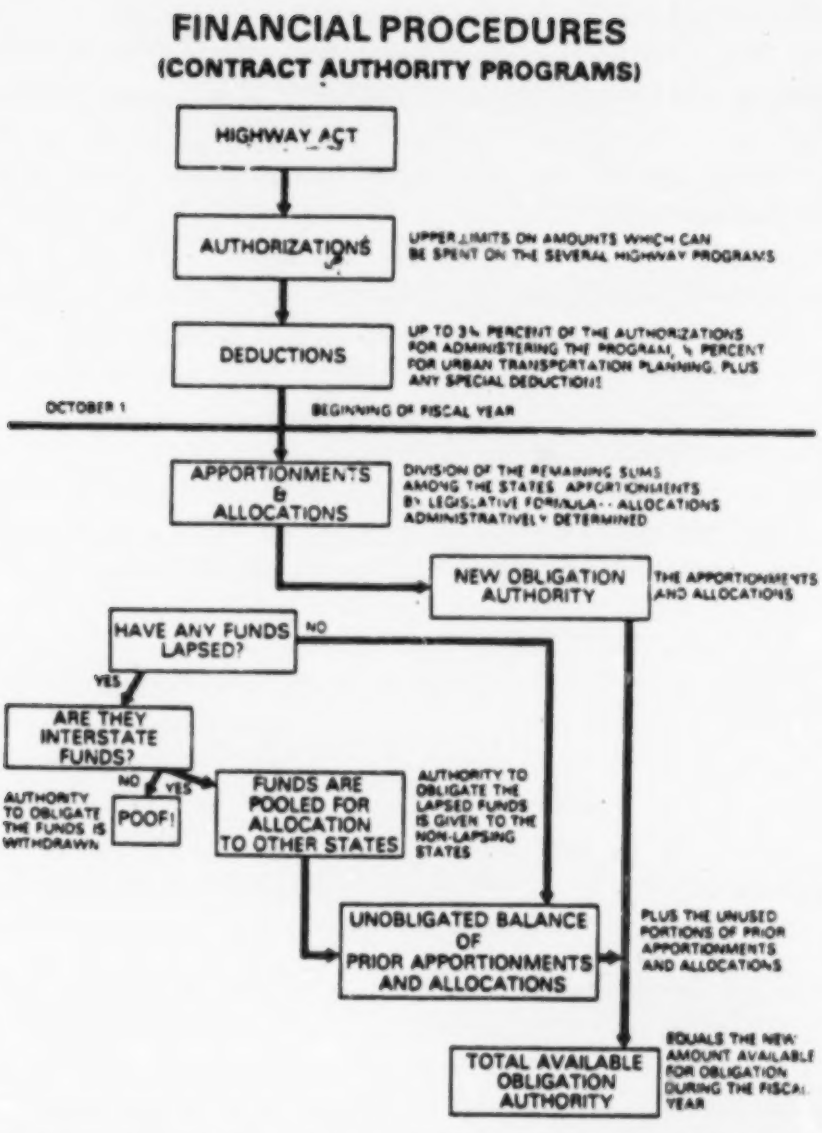
The other estoppel elements are also present in this case. Second, Mr. Litvack intended in September 1980, that the State act on his opinion given to General Leech. Clearly, Mr. Litvack was aware of the State's investigation and prosecution of the bid-riggers. His undisputed affidavit states that "the United States had no interest in Tennessee's efforts to recover any overcharges and Tennessee's settlement fund..." Tennessee had a clear representation from the United States that it could recover whatever overcharges it could from the bid-riggers without any concern that the United States would claim an interest. Clearly, Litvack intended his advice to be relied upon and it was. Third, there is absolutely no evidence suggesting that any Tennessee official had any knowledge that the United States would change its policy toward Tennessee's settlement fund or that the United States might have dual and conflicting policies. Certainly, given the representation from the Attorney General through his assistant, no Tennessee official had any reason to believe that the United States would want an interest in the State's recovered funds. Fourth, the State relied on Mr. Litvack's representation when it recovered the overcharges from the bid-riggers and allocated them for Tennessee's use. Much disruption and injury would result if Tennessee were now forced to give the United States a share of its settlement funds. Evans Affidavit, State's Exh. J. Shinn Affidavit, State's Exh. K. Certainly, it was reasonable for Tennessee to rely on Mr. Litvack's statements made when he was the Assistant Attorney General in charge of the Antitrust Division in the U.S. Department of Justice. *United States v. Lazy FC Ranch,* 481 F.2d 985, 990 n. 6 (9th Cir. 1973).

The inconsistent positions taken by two agencies of the Executive branch toward Tennessee constitute the requisite affirmative misconduct and fundamental unfairness necessitating application of estoppel against the Government. On the one hand, the Attorney General, pursuant to proper statutory authorization, represented that the United States had no claim or interest in the State's settlement funds from the bid-riggers;

while on the other hand, the Secretary and FHWA, without any statutory authorization or Congressional directive, attempted to recoup the Federal share of the same settlement funds. This is clearly and unmistakably affirmative governmental misconduct. The estoppel doctrine is fairly applied against the United States when "justice and fair play require it", *United States v. Lazy FC Ranch,* 481 F.2d 985, 988 (9th Cir. 1973), and when the balance of interests supports its application. *United States v. Ruby Co.,* 588 F.2d 697, 703 (9th Cir. 1978). The interests of Tennessee clearly outweigh those of the Secretary and FHWA. Tennessee sought out the proper federal official and acted consistently with that federal official's advice. Tennessee has allocated the funds for use and is threatened with injury if the funds are lost. Tennessee's interest in protecting its funds properly acquired is decidedly more weighty than the Secretary's FHWA's unauthorized recoupment to satisfy some bureaucratic bookkeeping procedure. It would be fundamentally and totally unfair for the Secretary and FHWA to share in Tennessee's settlement funds under these circumstances and, thus, the defendants must be estopped from so doing.

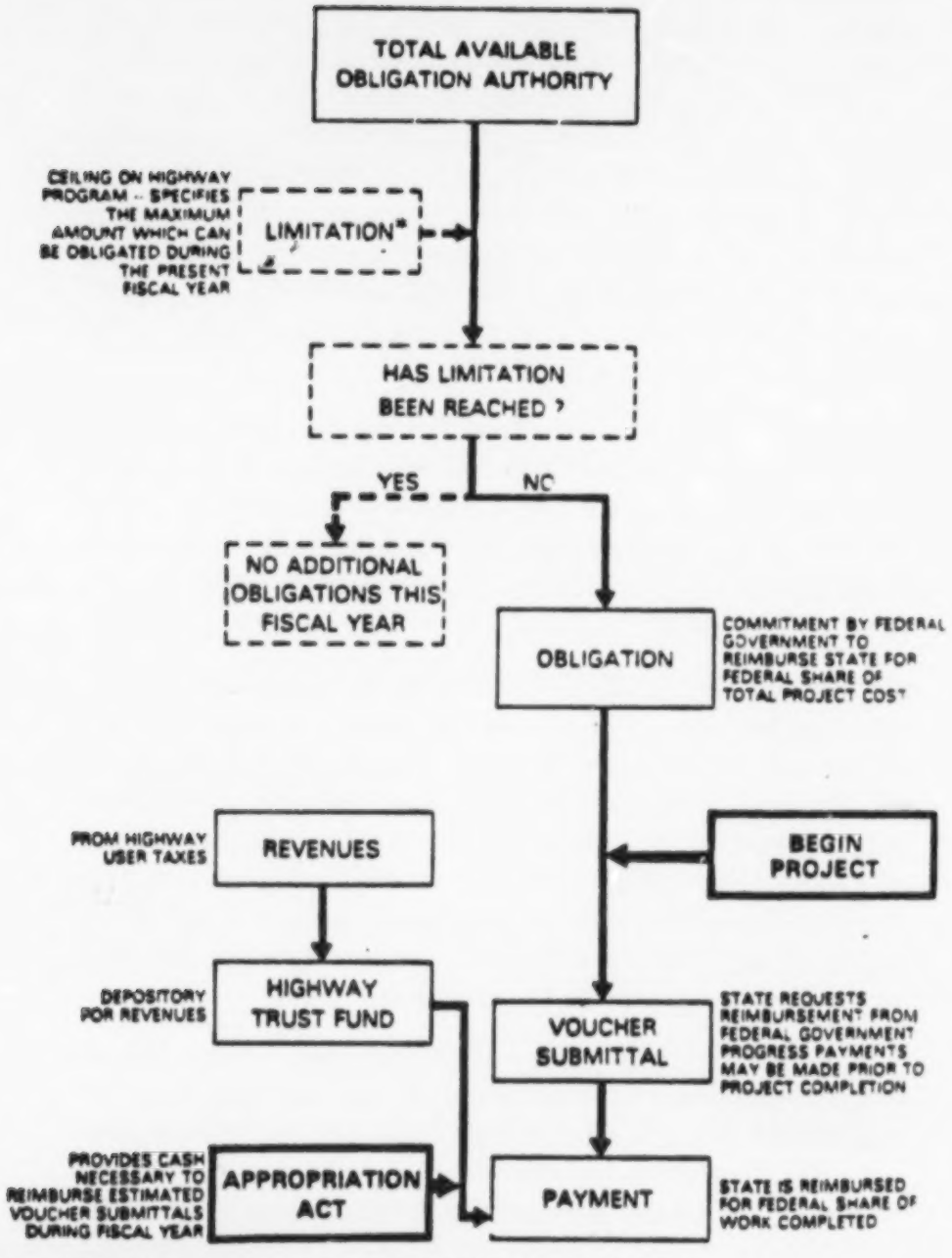
For all of the foregoing reasons, judgment will enter for the State of Tennessee and the defendants will be enjoined in an appropriate ORDER.

FIGURE I



SOURCE: U.S. DEPARTMENT OF TRANSPORTATION, FINANCING - FEDERAL - AID HIGHWAYS (1979).

BEST AVAIL


TOTAL AVAILABLE OBLIGATION AUTHORITY
CEILING ON HIGHWAY PROGRAM -- SPECIFIES THE MAXIMUM AMOUNT WHICH CAN BE OBLIGATED DURING THE PRESENT FISCAL YEAR
LIMITATION*
HAS LIMITATION BEEN REACHED ?
YES
NO
NO ADDITIONAL OBLIGATIONS THIS FISCAL YEAR
OBLIGATION
COMMITMENT BY FEDERAL GOVERNMENT TO REIMBURSE STATE FOR FEDERAL SHARE OF TOTAL PROJECT COST
FROM HIGHWAY USER TAXES
REVENUES
BEGIN PROJECT
DEPOSITORY FOR REVENUES
HIGHWAY TRUST FUND
VOUCHER SUBMITTAL
STATE REQUESTS REIMBURSEMENT FROM FEDERAL GOVERNMENT PROGRESS PAYMENTS MAY BE MADE PRIOR TO PROJECT COMPLETION
PROVIDES CASH NECESSARY TO REIMBURSE ESTIMATED VOUCHER SUBMITTALS DURING FISCAL YEAR
APPROPRIATION ACT
PAYMENT
STATE IS REIMBURSED FOR FEDERAL SHARE OF WORK COMPLETED
*LIMITATION MAY BE INITIATED BY THE EXECUTIVE BRANCH OR THE CONGRESS

ABLE COPY

ORDER

Pursuant to the Memorandum of Law contemporaneously filed in the above-styled case finding that nowhere in the Federal-Aid Highway Act, 23 U.S.C. §§ 101, *et seq.*, is there any specific Congressional authorization allowing the Secretary of the United States Department of Transportation or the Administrator or Division Administrator of the Federal Highway Administration of the United States Department of Transportation to demand a share of the State of Tennessee's recoveries of money from those persons, firms and associations that rigged bids on State highway construction projects under the Act in the estimated amount of $4,500,290.00; and

Further finding that even if the Secretary of Transportation or the Administrator and Division Administrator of the Federal Highway Administration had Congressional authority, under the facts of this case they should be estopped from asserting that authority to prevent fundamental unfairness and injury to the State of Tennessee;

It is therefore ORDERED AND DECREED that the Federal-Aid Highway Act, 23 U.S.C. §§ 101, *et seq.*, imposes no duty on the State of Tennessee to pay the Federal Government any of its recoveries from bid-riggers on State highway construction projects and that the Federal Government's demand to the State of Tennessee for a share of those recoveries is without Congressional authorization in the Federal-Aid Highway Act, 23 U.S.C. §§ 101, *et seq.*, and is without support under Article I, Section 8 of the Constitution of the United States;

It is further ORDERED that the Secretary of the United States Department of Transportation and the Administrator and Divsion Administrator of the Federal Highway Administrationi, their employees, agents and all persons acting in concert with them are hereby permanently enjoined from withholding or debiting or failing to honor the State of Tennessee's current billings for eligible costs incurred by the State on approved

highway projects under the Federal-Aid Highway Act, 23 U.S.C. §§ 101, *et seq.*, and that the Secretary and FHWA Administrators are hereby permanently enjoined from in any manner decreasing the amount of monies, obligation authority or apportionment for the State of Tennessee under the Act if such withholding, debiting or decreasing is due to the recoveries by the State of any overcharges which are as of this date reflected in a settlement agreement between the State of Tennessee and bid-riggers on highway construction projects in violation of Federal and State antitrust laws.

APPENDIX D

PERTINENT SECTIONS OF TITLE 23 UNITED STATES CODE (THE FEDERAL HIGHWAYS ACT)

§ 104. Apportionment

(b) On October 1 of each fiscal year except as provided in paragraphs (4) and (5) of this subsection, the Secretary, after making the deduction authorized by subsection (a) of the section, shall apportion the remainder of the sums authorized to be appropriated for expenditure upon the Federal-aid systems for that fiscal year, among the several States in the following manner:

(1) For the Federal-aid primary system (including extensions in urban areas and priority primary routes)—

> Two-thirds according to the following formula: one-third in the ratio which the area of each State bears to the total area of all the States, one-third in the ratio which the population of rural areas of each State bears to the total population of rural areas of all the States as shown by the latest available Federal census, and one-third in the ratio which the mileage of rural delivery routes and intercity mail routes where service is performed by motor vehicles in each State bear to the total mileage of rural delivery and intercity mail routes where service is performed by motor vehicles, as shown by a certificate of the Postmaster General, which he is dierected to make and furnish annually to the Secretary; and one-third as follows: in the ratio which the population in urban areas in each State bears to the total population in urban areas in all the States as shown by the latest Federal census. No State (other than the District of Columbia) shall receive less than one-half of 1 per centum of each year's apportionment.

(2) For the Federal-aid secondary system:

One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of rural areas of each State bears to the total population of rural areas of all the States as shown by the latest available Federal census; and one-third in the ratio which the mileage of rural delivery and intercity mail routes where service is performed by motor vehicles, certified as above provided, in each State bears to the total mileage of rural delivery and intercity mail routes where service is performed by motor vehicles in all the States. No State (other than the District of Columbia) shall receive less than one-half of 1 per centum of each year's apportionment.

[(3) Repealed. Pub.L. 94-280, Title I, § 112(c), May 5, 1976, 90 Stat. 434.]

(4) For the Interstate System, for the fiscal years ending June 30, 1957, June 30, 1958, and June 30, 1959:

One-half in the ratio which the population of each State bears to the total population of all the States as shown by the latest available Federal census, except that no State shall receive less than three-fourths of 1 per centum of the funds so apportioned; and one-half in the manner provided in paragraph (1) of this subsection. The sums authorized by section 108(b) of the Federal-Aid Highway Act of 1956 for the fiscal years ending June 30, 1958, and June 30, 1959, shall be apportioned on a date not less than six months and not more than twelve months in advance of the beginning of the fiscal year for which authorized.

(5)(A) Except as provided in subparagraph (B)—For the interstate System for the fiscal years 1960 through 1990:

For the fiscal years 1960 through 1966, in the ratio which the estimated cost of completing the Interstate System in such State, as determined and approved in the manner pro-

vided in this paragraph, bears to the sum of the estimated cost of completing the Interstate System in all of the States. For the fiscal years 1967 through 1990, in the ratio which the Federal share of the estimated cost of completing the Interstate System in such State, as determined and approved in the manner provided in this paragraph, bears to the sum of the estimated cost of the Federal share of completing the Interstate System in all of the States. Each apportionment herein authorized for the fiscal years 1960 through 1990, inclusive, shall be made on October 1 of the year preceding the fiscal year for which authorized. As soon as the standards provided for in subsection (b) of section 109 of this title have been adopted, the Secretary, in cooperation with the State highway departments, shall make a detailed estimate of the cost of completing the Interstate System as then designated, after taking into account all previous apportionments made under this section, based upon such standards and in accordance with rules and regulations adopted by him and applied uniformly to all of the States. The Secretary shall transmit such estimates to the Senate and the House of Representatives within ten days subsequent to January 2, 1958. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1960, June 30, 1961, and June 30, 1962. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the senate and the House of Representatives within ten days subsequent to January 2, 1961. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years years ending June 30, 1963, June 30, 1964, June 30, 1965, and June 30, 1966. The

Secretary shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1965. Upon the approval of such estimate by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1967; June 30, 1968; and June 30, 1969. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1968. Upon the approval by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1970, and June 30, 1971. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives on April 20, 1970. Upon the approval by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1972, and June 30, 1973. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1972. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal

years ending June 30, 1974, June 30, 1975, and June 30, 1976. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1975. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimate in making the apportionment for the fiscal year ending September 30, 1977. The Secretary shall make the apportionment for the fiscal year ending September 30, 1978, in accordance with section 103 of the Federal-Aid Highway Act of 1976. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1977. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1979, and September 30, 1980. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1979. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1981, and September 30, 1982. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner

as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1981. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1983, and September 30, 1984. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1983. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1985, and September 30, 1986. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1985. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1987, and September 30, 1988. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1987. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1989, and September 30, 1990. Whenever the Secretary, pursuant to this subsection, requests and receives estimates of

cost from the State highway departments, he shall furnish copies of such estimates at the same time to the Senate and the House of Representatives. The Secretary shall not include in any estimate submitted under this provision after December 31, 1978, any cost of a project to expand or clear zones immediately adjacent to the paved roadway of routes designed prior to February, 1967. Notwithstanding any other provisions of this subparagraph, the Secretary in making the revised estimate of the cost of completing the then designated Interstate System for the purpose of transmitting it to the Senate and House of Representatives within ten days subsequent to January 2, 1983, or thereafter, shall include only those costs eligible for funds authorized by subsection (b) of section 108 of the Federal-Aid Highway Act of 1956, as amended, including the amendments made by section 4 of the Federal-Aid Highway Act of 1981.

(B) For resurfacing, restoring, rehabilitating, and reconstructing the Interstate System:

55 per centum in the ratio that lane miles on the Interstate routes designated under sections 103 and 139(c) of this title (other than those on toll roads not subject to a Secretarial agreement provided for in section 105 of the Federal-Aid Highway Act of 1978) in each State bears to the total of all such lane miles in all States; and 45 per centum in the ratio that vehicle miles traveled on lanes on the Interstate routes designated under sections 103 and 139(c) of this title (other than those on toll roads not subject to a Secretarial agreement provided for in section 105 of the Federal-Aid Highway Act of 1978) in each State bears to the total of all such vehicle miles in all States. Notwithstanding the preceding sentence, no State excluding any State that has no interstate lane miles shall receive less than one-half of 1 per centrum of the total apportionment made by this subparagraph for any fiscal year.

(6) For the Federal-aid urban system:

In the ratio which the population in urban areas, or parts thereof, in each State bears to the total population in such urban areas, or parts thereof, in all the States as shown by the latest available Federal census. No State shall receive less than one-half of 1 per centum of each year's apportionment.

§ 105. Programs

(a) As soon as practicable after the apportionment for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

(b) In approving programs for projects on the Federal-aid secondary system, the Secretary shall require that such projects be selected by the State highway department and the appropriate local officials in cooperation with each other, except in States where all public roads and highways are under the control and supervision of the State highway department such selection shall be made after consultation with appropriate local officials.

(c) In approving programs for projects on the Federal-aid primary system, the Secretary shall give preference to such projects as will expedite the completion of an adequate and connected system of highways interstate in character.

(d) In approving programs for projects on the Federal-aid urban system, the Secretary shall require that such projects be

selected by the appropriate local officials with the concurrence of the State highway department of each State and, in urbanized areas, also in accordance with the planning process required pursuant to section 134 of this title.

(e) In approving programs for projects under this chapter, the Secretary may give priority of approval to, and expedite the construction of, projects that are recommended as important to the national defense by the Secretary of Defense, or other official authorized by the President to make such recommendation.

(f) In approving programs for projects on the Federal-aid systems pursuant to chapter 1 of this title, the Secretary shall give priority to those projects which incorporate improved standards and features with safety benefits.

(g) In preparing programs to submit in accordance with subsection (a) of this section, the State highway departments shall give consideration to projects providing direct and convenient public access to public airports, public ports for water transportation, new town communities, and new town-in-town communities, and in approving such programs the Secretary shall give consideration to such projects.

(h) In preparing programs to submit in accordance with subsection (a) of this section, the State highway departments may give priority to projects for the reconstruction, resurfacing, restoration, or rehabilitation of highways which are incurring a substantial use as a result of transportation activities to meet national energy requirements and which will continue to incur such use, and in approving such programs the Secretary may give priority to such projects.

§ 106. Plans, specifications, and estimates

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such

surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

§ 118. Availability of sums apportioned

(a) On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior Acts, such sums shall be available for expenditure under the provisions of this title.

(b)(1) Sums apportioned to each Federal-aid system (other than the Interstate System) shall continue available for expenditure in that State for the appropriate Federal-aid system or part thereof (other than the Interstate System) for a period of three years after the close of the fiscal year for which such sums are authorized and any amounts so apportioned remaining unexpended at the end of such period shall lapse.

(2) Except as otherwise provided in this subsection, sums apportioned for the Interstate System in any State shall remain available for expenditure in that State for the Interstate System until the end of the fiscal year for which authorized. Sums not obligated within the time period prescribed by the preceding sentence shall be made available by the Secretary for projects on the Interstate System (other than projects for which sums are apportioned under section 104(b)(5)(B) in accordance with the following priorities: First, for high cost projects which directly contribute to the completion of an Interstate segment which is not open to traffic; and second, for projects of high cost in relation to a State's apportionment. Sums may only be made available under this paragraph in any State if the Secretary

determines that the State has obligated all of its apportionments other than an amount which, by itself, is insufficient to pay the Federal share of the cost of a project on the Interstate System which has been submitted by such State to the Secretary for approval, and the applicant is willing and able to (A) apply the funds to a ready-to-commence project; and (B) in the case of construction work, begin work within ninety days of obligation. Sums made available under this paragraph shall remain available until expended.

(3) Any amount apportioned to the States for the Interstate System under subsection (b)(5)(B) of section 104 of this title shall continue to be available for expenditure in that State for a period of two years after the close of the fiscal year for which such sums are authorized. Sums not obligated within the time period prescribed by the preceding sentence shall be made available by the Secretary for projects for resurfacing, restoring, rehabilitating, and reconstructing the Interstate System to any other State applying for such funds, if the Secretary determines that the State has obligated all of its apportionments under such subsection other than an amount which, by itself, is insufficient to pay the Federal share of the cost of such a project which has been submitted by such State to the Secretary for approval, and the applicant is willing and able to (A) obligate the funds within one year of the date the funds are made available; (B) apply them to a ready-to-commence project; and (C) in the case of construction work, begin work within ninety days of obligation. Sums made available under this paragraph shall remain available until expended.

(4) Sums apportioned to a Federal-aid system for any fiscal year shall be deemed to be expended if a sum equal to the total of the sums apportioned to the State for such fiscal year and previous fiscal years is obligated. Any Federal-aid highway funds released by the payment of the final voucher or by the modification of the formal project agreement shall be credited to the same class of funds, primary, secondary, urban, or interstate, previously apportioned to the State and be immediately available for expenditure.

No. 84-1650

Office - Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

STATE OF TENNESSEE, EX REL.
W. J. Michael Cody,
Attorney General and Reporter,

PETITIONER,

vs.

ELIZABETH H. DOLE, ET AL.,

RESPONDENTS.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE STATES OF ALASKA, ARIZONA, COLORADO, HAWAII, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, NEVADA, NEW JERSEY, SOUTH DAKOTA, VERMONT, WEST VIRGINIA AND WISCONSIN AS AMICI CURIAE SUPPORTING PETITIONER

ROBERT K. CORBIN*
Attorney General of Arizona

ALISON B. SWAN
Chief Counsel
GARY P. BRADY
Assistant Attorney General
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 255-4751

(Additional List of Counsel on Inside Cover)

*Counsel of Record
On Behalf of Amici States

LIST OF COUNSEL

Counsel for the State of Alaska

NORMAN C. GORSUCH
Attorney General
RICHARD D. MONKMAN
Assistant Attorney General
Antitrust Section
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

Counsel for the State of Colorado

DUANE WOODARD
Attorney General
THOMAS P. MCMAHON
First Assistant Attorney General
Chief, Antitrust Unit
1525 Sherman, 2nd Fl.
Denver, Colorado 80203

Counsel for the State of Hawaii

MICHAEL A. LILLY
Attorney General
SONIA FAUST
CORAL WONG PIETSCH
Deputy Attorneys General
335 Merchant Street, Rm. 241A
Honolulu, Hawaii 96813

Counsel for the State of Indiana

LINLEY E. PEARSON
Attorney General
FRANK A. BALDWIN
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Counsel for the State of Iowa

THOMAS J. MILLER
Attorney General
JOHN R. PERKINS
Assistant Attorney General
Special Litigation Division
Hoover State Office Building
Des Moines, Iowa 50319

Counsel for the Commonwealth of Kentucky

DAVID L. ARMSTRONG
Attorney General
JAMES M. RINGO
Assistant Attorney General
Antitrust Branch, Suite 18
State Capitol Building
Frankfort, Kentucky 40601

Counsel for the State of Louisiana

WILLIAM J. GUSTE, JR.
Attorney General
JOHN R. FLOWERS, JR.
Assistant Attorney General
Department of Justice
Chief, Antitrust Division
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112

Counsel for the State of Maryland

STEPHEN H. SACHS
Attorney General
MICHAEL F. BROCKMEYER
Assistant Attorney General
Chief, Antitrust Division
The Munsey Building
Seven North Calvert Street
Baltimore, Maryland 21202

Counsel for the State of Minnesota

HUBERT H. HUMPHREY III
Attorney General
SUE R. HALVERSON
Assistant Attorney General
Director, Antitrust Division
2nd Floor, Ford Building
117 University Avenue
St. Paul, Minnesota 55155

Counsel for the State of Nevada

BRIAN MCKAY
Attorney General
DAN R. REASER
Deputy Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Counsel for the State of New Jersey

IRWIN I. KIMMELMAN
Attorney General
LAUREL A. PRICE
Deputy Attorney General
Chief, Antitrust Section
25 Market Street
C. N. 085
Trenton, New Jersey 08625

Counsel for the State of South Dakota

MARK V. MEIERHENRY
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
Office of the Attorney General
Capitol Building
Pierre, South Dakota 57501

Counsel for the State of Vermont

JEFFREY L. AMESTOY
Attorney General
GLENN A. JARRETT
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602

Counsel for the State of West Virginia

CHARLIE BROWN
Attorney General
DONALD L. DARLING
Deputy Attorney General
Director of the Antitrust Division
Room 26 East
State Capitol
Charleston, West Virginia 25305

Counsel for the State of Wisconsin

BRONSON C. LA FOLLETTE
Attorney General
MICHAEL L. ZALESKI
Assistant Attorney General
114 East, State Capitol
Madison, Wisconsin 53702

TABLE OF CONTENTS

		Page
	TABLE OF AUTHORITIES	ii
I.	INTEREST OF THE AMICI CURIAE	1
II.	SUMMARY OF ARGUMENT	1
III.	ARGUMENT	4
	A. The Decision of the Court of Appeals Is Contrary To This Court's Ruling In *Illinois Brick*	4
	B. The FHWA Suffered No Injury As A Result Of The Bid Rigging Conspiracy	13
	C. The Rule of Law Adopted By The Court Of Appeals Will Have A Large Impact On The States	14
IV.	CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	*Page*
D. R. Smalley & Sons, Inc. v. U.S., 372 F.2d 505 (Ct. of Claims 1967)	16
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	17
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	1, 4
Tennessee v. Dole, 749 F.2d 331 (6th Cir. 1984)	4
U.S. v. Allied Asphalt Paving Co., 451 F.Supp. 804 (N.D. Ill. 1978)	16
U.S. v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981)	14, 17
U.S. v. Borden, Inc., No. LR-Cr-77-60 (E.D. Ark. 1977), *reported in* 1970-1979 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 45,077, p. 53,691	16
Warth v. Seldin, 422 U.S. 490 (1975)	17
Statutes and Rules:	
7 U.S.C. § 2011 (1982), *et seq.*	14
15 U.S.C. § 15	7
15 U.S.C. § 15A	7
23 U.S.C. § 104 (1982)	3, 13
23 U.S.C. § 104(b)(1) (1982)	13
23 U.S.C. § 120(C) (1982)	10, 17
42 U.S.C. § 1396 (1982), *et seq.*	16
42 U.S.C. § 1437 (1982), *et seq.*	16
49 U.S.C. § 1101 (1964), *et seq.* (repealed 1970)	16
49 U.S.C. § 1601 (1982), *et seq.*	16
7 C.F.R. Part 273 (1983)	14

Supreme Court Rules:

Rule 36.4 1

Other Authorities:

National Association of Attorneys General, *Antitrust Reports*, December, 1980, to February, 1985 15

P. A. Samuelson, *Economics*, (11th ed. 1980) 6, 8

U.S. Dept. of Justice Road Building Cases, 1979 to 1984 (unpublished report) 15

I. INTEREST OF THE AMICI CURIAE

The attorneys general of the amici states submit this brief pursuant to Supreme Court Rule 36.4.

In recent years, the states' road-building projects have been the targets of price-fixing conspiracies entered into by highway construction contractors, resulting in substantial overcharges to the states. The states have initiated a number of actions to recover damages under the antitrust laws, but, as exemplified by this case, the Federal Highway Administration (FHWA) claims entitlement to a significant portion of the damages actually recovered. The amici states therefore have a substantial interest in this case, which decides whether the federal government has a lawful claim to a portion of the states' recoveries.

Additionally, the amici states and their political subdivisions receive federal grants for many kinds of public works and services other than highway construction. If the states recover damages for antitrust injuries sustained in connection with any of these other federally-assisted programs, it is possible that the federal government will seek a portion of the damages in the same way that it seeks a portion of highway bid rigging recoveries. For this reason also, the amici states have a direct and substantial interest in the law governing the federal government's right to share in the states' recoveries in antitrust actions.

II. SUMMARY OF ARGUMENT

A. The decision of the court of appeals conflicts irreconcilably with *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which this Court ruled that only those who purchase directly from price-fixing conspirators may recover damages for antitrust injuries.

The primary basis for the *Illinois Brick* decision was the perception that, although it is appealing to try to allocate overcharges among all those injured by antitrust violations, the economic analysis necessary to trace pass-on injuries would overly complicate and reduce the effectiveness of antitrust cases. *Illinois Brick*, therefore, instructed the courts not to undertake the uncertain and difficult task of analyzing elasticities of demand, which would be necessary in order to allocate injury among everyone affected by unlawful overcharges.

In spite of the *Illinois Brick* rule, the Sixth Circuit held that the FHWA was injured by the antitrust violation and entitled to restitution from Tennessee. It then instructed the district court to determine the amount of restitution. This result permits the FHWA to recover damages for antitrust injuries even though it was not the direct purchaser.

In addition, in order for the district court to calculate restitution, it will have to determine first how much the FHWA was injured compared to Tennessee. This allocation of injury simply cannot be accomplished without considering how Tennessee reacted to high construction costs caused by bid rigging conspiracies. If Tennessee reacted by sharply reducing its demand for road construction, the result would be that bid rigging *reduced* total expenditures on road construction in Tennessee, which, in turn, would mean that the FHWA paid Tennessee *less* money because of the bid rigging. Conversely, if Tennessee reacted to the high construction costs brought about by bid rigging by reducing its demand for roads only slightly, the result could indeed be that the FHWA mistakenly paid Tennessee more than it should have. Fundamentally, the elasticity of Tennessee's demand for road construction thus determines the allocation of injury between Tennessee and the FHWA, but *Illinois Brick* precludes the court from analyzing elasticity.

B. Because the Highway Act establishes a fixed amount that the FHWA contributes to Tennessee for road construction, the FHWA has not been injured by the bid rigging conspiracies.

Under the Highway Act, Congress appropriates a lump-sum for highway construction, and the FHWA then follows a statutory formula for apportioning the total funds among the states. 23 U.S.C. § 104 (1982). Once the FHWA applies the formula and determines Tennessee's share of the highway funds, the FHWA cannot exceed that amount. Although bid rigging in Tennessee increased construction prices, the FHWA was completely insulated from the overcharges because its obligation to pay Tennessee was fixed by operation of the statutory formula. Thus, the FHWA's overall obligation to pay Tennessee did not and could not increase at all as a result of the bid rigging conspiracies. The FHWA therefore was not injured. It was only the State of Tennessee that was injured by the bid rigging because the higher costs meant that the state was able to construct fewer miles of road.

C. The Sixth Circuit's ruling will have a substantial monetary impact on the states.

Between 1980 and 1985, nineteen states recovered about $70 million in civil damages from firms and individuals accused of bid rigging on highway construction projects. On the basis of the Sixth Circuit's decision in this case, the FHWA has stated that it will seek a share of other states' recoveries from bid riggers. From Tennessee, it is requesting about 38 percent of the state's total recovery, and if it seeks a similar percentage from the other states, the total loss to the states will be $26 million.

Moreover, the Sixth Circuit's authorization for the federal government to obtain restitution from the states for

antitrust injuries does not just apply in the context of highway bid rigging. Indeed, the court's rule has potential application anytime a federally-funded state project is the victim of an antitrust violation.

III. ARGUMENT

A. The Decision of the Court of Appeals Is Contrary To This Court's Ruling in *Illinois Brick*

At issue in this case is whether the federal government may avoid the rule in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and recover for antitrust injuries by seeking restitution from the direct purchaser, the State of Tennessee.

Basing its decision on common law notions of restitution, the court of appeals below ruled that the federal government is entitled to a portion of the money Tennessee recovered from individuals and firms charged with rigging bids on federally funded highway construction projects. *Tennessee v. Dole*, 749 F.2d 331 (6th Cir. 1984). In the view of that court, because of the price-fixing conspiracy of the highway contractors, the FHWA mistakenly paid more to Tennessee than it would have in the absence of the conspiracy. According to the Sixth Circuit, the FHWA, in addition to Tennessee, was injured by the antitrust violation, and it would therefore be an unfair windfall to permit Tennessee to retain all the money recovered from the conspirators.

The decision of the court of appeals is directly contrary to *Illinois Brick* because it permits the FHWA to recover for antitrust injuries even though it was not the direct purchaser.

In *Illinois Brick*, this Court ruled that only those who buy directly from price-fixing conspirators may recover

damages for resulting injuries. Further, the direct purchaser is entitled to recover and retain the *entire* amount of the overcharge, even though part of the overcharge was passed on to others who were then, in turn, also injured by the antitrust violation. 431 U.S. at 745-746. The principal basis for the *Illinois Brick* rule was the concern that litigating pass-on issues would tend to deplete the overall recovery and involve courts in the uncertain task of computing elasticities of supply and demand, which would be necessary to apportion damages among injured buyers. 431 U.S. at 741-743. The economic analysis necessary to establish the amount of the passed-on overcharge would greatly complicate and protract antitrust cases, "transform[ing] treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge — from direct purchasers to middlemen to ultimate consumers." 431 U.S. at 737.

For the reasons explained below, the Sixth Circuit's decision requires the district court, on remand, to attempt exactly the same type of apportioning and economic analysis that *Illinois Brick* directed the federal courts not to undertake.

The FHWA argued before the Sixth Circuit that it is entitled to recover from Tennessee the difference between the money it actually paid on the rigged highway projects and the amount it would have paid if the projects had not been rigged. Appellant's Brief at 24-25.[1] The Sixth Circuit

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[1] In its brief to the Sixth Circuit, the FHWA asserted that to determine the amount of overpayment to Tennessee, first one calculates the "correct," non-rigged contract price by subtracting the amount recovered in connection with a rigged project from the project's rigged price. Once the "correct" price is calculated in this way, determining the amount owed to the FHWA is simply a matter of figuring the difference between the amount the FHWA actually paid on the project and the amount it would have paid based on the "correct" price. Thus, if the FHWA paid 90 percent of the rigged price, it would have paid 90 percent of the "correct" price. Appellant's Brief at 24-25.

apparently agreed that this was the proper starting point for calculating the amount of money owed to the FHWA, but it instructed the district court to consider other factors also in arriving at a final figure, such as Tennessee's costs of recovery. 749 F.2d at 331.

Even assuming *arguendo* that the Sixth Circuit was correct in finding that the FHWA was injured and entitled to restitution, reconstructing the amount that the FHWA would have paid if there had been no bid rigging is not nearly as simple as the FHWA would have us believe. Elementary economics teaches that with lower prices for a good, a consumer's purchases of that good will increase. P. A. Samuelson, *Economics*, 54-55 (11th ed. 1980) [hereinafter cited as Samuelson]. Therefore, to reconstruct accurately how much the FHWA would have paid in the absence of rigged construction costs, consideration must be given to how lower, non-rigged prices would have affected Tennessee's demand for road construction.[2] In other words, a proper reconstruction of the harm caused to the FHWA would have to involve consideration of both the "correct" price and the "correct" demand in the absence of bid rigging.[3]

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[2] At page 33 of its brief to the Sixth Circuit, the FHWA acknowledged that inflated costs resulting from bid rigging cause a decrease in the amount of road constructed.

[3] Calculating the "correct" price and the appropriate restitution amount is further complicated by other factors not discussed by the Sixth Circuit. For example, it is not uncommon for bid rigging defendants to have been involved in numerous rigged highway construction projects, some of which were federally funded and some of which were not. Yet when Tennessee obtains damages from these contractors, the settlements provide only for a lump sum payment, making it impossible to apportion the damages between the federally-funded projects and the state-funded projects.

Additionally, Tennessee and other states, recognizing the difficulty of determining the actual dollar amount of damages incurred as a result of bid rigging on a contract, frequently follow rules of thumb in deciding on an amount to seek from defendants. Some states seek damages equal

Highway bid rigging in Tennessee spanned a number of years and involved many individuals and firms, affording the state sufficient time to adjust to the higher rigged prices. If, in the face of the higher construction prices caused by collusive bidding, Tennessee sharply cut back its demand for roads, the FHWA may actually have paid Tennessee *less* than it would have paid in the absence of bid rigging, where Tennessee's demand for road construction would have been greater. In these circumstances, the FHWA did not mistakenly pay out more than it would have in the absence of bid rigging; instead, it mistakenly paid out less. There is no harm at all to the FHWA in this case because Tennessee absorbed all of the injury by sharply reducing its demand for road construction.

Conversely, if Tennessee reacted to the high, rigged prices by reducing its demand for road construction only slightly, then it is possible that the FHWA paid more to Tennessee than it would have if the bidding had been competitive.

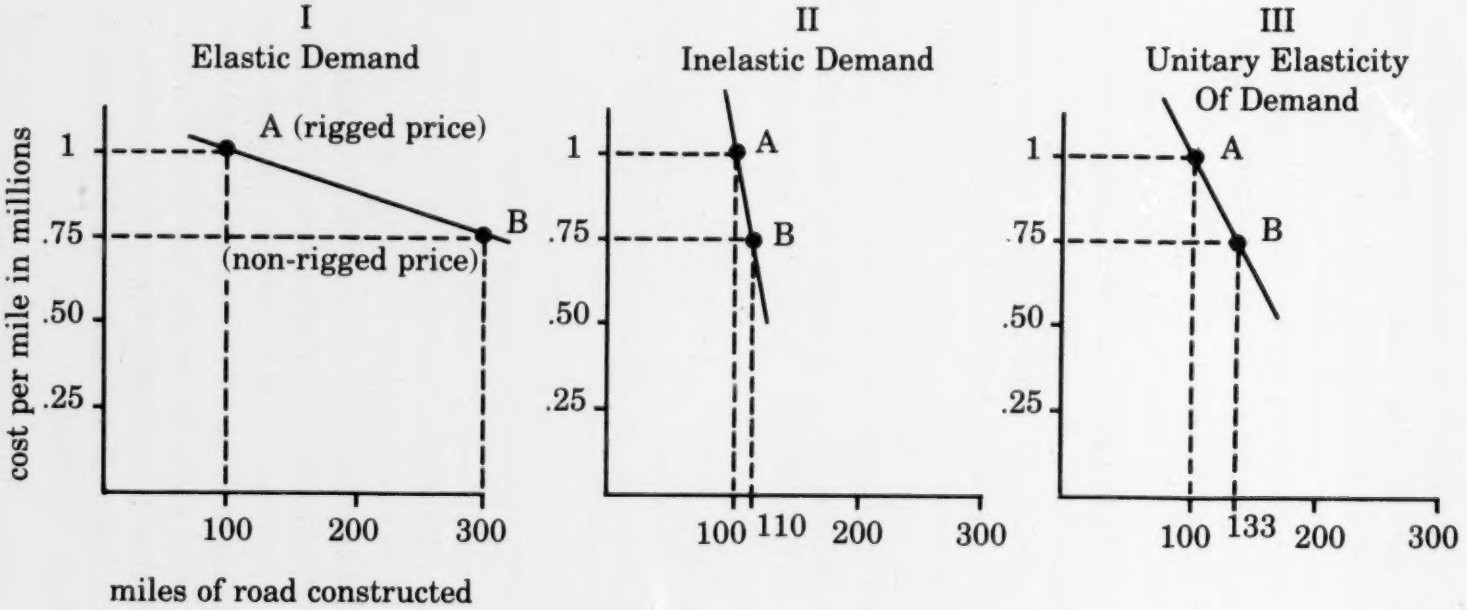
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to fifteen percent of the contract price from defendant bid riggers who actually won the contract. The same state, however, may seek only five percent from a defendant bid rigger who submitted a complementary bid on a rigged project but did not win the contract. Other times, states consider the ability of the bid riggers to pay and seek damages equal to ten percent of the defendant's net worth. Because of the different rules used by the states in seeking damages, it is not accurate to assert, as the FHWA does, that the "correct" contract price can be determined by subtracting recoveries from the actual contract price.

Finally, because the states may obtain treble damages from bid riggers, 15 U.S.C. § 15, that fact would certainly be reflected in the size of the settlements the states obtain from the bid riggers. The federal government, however, cannot obtain treble damages. 15 U.S.C. § 15A. Thus, the job of the district court on remand to calculate the amount of restitution is complicated by this factor also. The court must not permit the FHWA to receive the benefit of Tennessee's ability to use the threat of treble damages.

The responsiveness of Tennessee's demand for road construction to higher prices is critically important in assessing injury to the FHWA. In economic terms, the elasticity of Tennessee's demand for roads is the key to whether the FHWA is entitled to restitution. *See generally* Samuelson, 357-359. The three demand curves on page 9 of this brief perhaps better illustrate the importance elasticity of demand plays in determining damage to the FHWA.

TENNESSEE'S DEMAND FOR ROAD CONSTRUCTION



In each of the three diagrams on page 9, the vertical axis measures the cost to Tennessee of constructing one mile of road, while the horizontal axis measures the number of miles of road constructed, or demanded, by Tennessee. The downward-sloping demand curve expresses the relationship between the price of road construction and the amount demanded: as the price per mile falls, more miles of road are demanded by Tennessee.

Assuming that bid rigging raises the price of road construction to $1 million per mile, then in Diagram I, point A shows that 100 miles of road are constructed when there is bid rigging. The total cost of constructing that much road is represented by the area of the rectangle that point A makes with the two axes. Because of the sharing of costs between a state and the FHWA under the Federal Highway Act, Tennessee might pay ten percent of the total cost while the FHWA would pay ninety percent. 23 U.S.C. § 120(C) (1982). Thus, the total cost of road construction in Diagram I is $100 million, of which Tennessee pays $10 million, and the FHWA pays $90 million. In the absence of bid rigging, however, the price per mile would have been lower, say $750,000 per mile, and Tennessee would have demanded many more miles of road. Point B in Diagram I shows that with the non-collusive price of $750,000 per mile, Tennessee would have constructed 300 miles of road. Again, the total cost is represented by the area of the rectangle point B forms within the two axes. The total cost of road construction would be $225 million, of which Tennessee would pay $22.5 million and the FHWA $202.5 million. Diagram I, therefore, portrays the situation where, because Tennessee sharply reduces its demand in response to rigged prices, the FHWA actually pays Tennessee *less* than it would have if there had been no collusion. In economic terms, this is the situation where Tennessee's demand is elastic for the described change in prices.

In Diagram II, point A shows that with the rigged price of $1 million per mile, Tennessee built 100 miles of road at a total cost of $100 million, of which Tennessee paid $10 million and the FHWA paid $90 million. In the absence of bid rigging, the price would have been $750,000 per mile, but this time, as point B in Diagram II shows, Tennessee's demand for roads increased only slightly to 110 miles. The total cost in the absence of bid rigging is thus $82.5 million, of which Tennessee pays $8.25 million and the FHWA pays $74.25 million. In this case, in the absence of bid rigging, the FHWA would have paid less than it actually paid in the presence of bid rigging. Tennessee's inelastic demand for this change in prices accounts for the result.

Diagram III portrays the situation where the FHWA pays the same amount, $90 million, when there is bid rigging and when there is not. This diagram portrays unitary elasticity of demand.

To summarize the diagrams, when there is bid rigging, the FHWA pays Tennessee $90 million as its share of the total costs of road construction. When there is no bid rigging, however, the FHWA's payment varies depending on the elasticity of Tennessee's demand for road construction. When Tennessee's demand is elastic, the FHWA pays $202.5 million; when demand is inelastic, the FHWA pays $74.25 million; and when Tennessee's elasticity of demand is unitary, the FHWA pays $90 million. Therefore, it is only when Tennessee's demand is inelastic that the FHWA is harmed at all by bid rigging. Only where Tennessee's demand is inelastic does the FHWA mistakenly pay out more than it would have if there had been competitive bidding. Where Tennessee's demand is elastic or unitary, the FHWA cannot claim any injury as a result of the bid rigging by contractors.

Under the Sixth Circuit's decision, the district court, in determining the amount of restitution, will have to hear evidence on the elasticity of Tennessee's demand for road construction and how the elasticity has changed over time. Any restitution calculation by the district court that ignores elasticity would be seriously flawed and contrary to principles of both equity and economics. Yet by taking evidence on elasticity and by trying to reconstruct what Tennessee's road-building decisions would have been but for bid rigging, the district court will be trying to make the very determinations that this court foreclosed in *Illinois Brick*. This Court has clearly stated that in determining injury from antitrust violations, the federal courts simply should not embark on the task of measuring elasticities because "it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." 431 U.S. at 742. Moreover, "attention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge." 431 U.S. at 743.

Illinois Brick was grounded on the judgment that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." 431 U.S. at 735. This was such an important concern to the Court that it specifically rejected attempts to carve out exceptions to the *Illinois Brick* rule. 431 U.S. at 744. The Sixth Circuit, however, has created an exception. Under a restitution label, the court denies full recovery to the direct purchaser and permits recovery by one other than the direct purchaser. It is for this reason that the decision of the court below is contrary to *Illinois Brick*.

B. The FHWA Suffered No Injury As A Result Of The Bid Rigging Conspiracy

The preceding argument assumed *arguendo* that the Sixth Circuit correctly ruled that the FHWA may have been injured, but by focusing attention on the funding scheme established by the Highway Act, it is apparent that the FHWA has not been harmed by the bid rigging conspiracies, nor has it unjustly enriched Tennessee through overpayments of highway funds.

Under the Highway Act, Congress appropriates a lump sum for road construction and the FHWA then apportions the funds among the states according to a statutory formula. 23 U.S.C. § 104 (1982). The formula instructs the FHWA, in determining each state's share, to consider factors such as the state's geographic area, population, and the mileage of rural mail routes. 23 U.S.C. § 104(b)(1) (1982). Significantly, the allotment is not affected by the costs of road construction in a state. Therefore, a state that has high construction costs because of bid rigging does not receive more money from the FHWA.

For Tennessee, the FHWA applied the statutory formula and determined the state's share of the funds appropriated by Congress. Once this figure was calculated, it operated as a limit on the amount of money the FHWA could pay to Tennessee for road construction. It was then Tennessee's responsibility to buy the greatest amount of road, given its available resources. No matter how much road Tennessee was able to construct, however, the FHWA's payment to the state would not and could not exceed the statutorily-determined limit. As a result of the higher construction costs generated by bid rigging, Tennessee was not able to purchase as many miles of road as it could have in the absence of bid rigging. The result is that the bid rigging conspiracies injured Tennessee, which now has fewer miles

of road, but the bid rigging could not and did not increase the amount of the FHWA's payment to Tennessee. Otherwise stated, because the Highway Act determines the amount the FHWA pays to Tennessee, the FHWA is completely insulated from injury caused by bid rigging conspirators. *See U.S. v. Azzarelli Construction Co.*, 647 F.2d 757, 761 (7th Cir. 1981). All injury from the conspiracies was inflicted on Tennessee, which was forced to construct fewer miles of road.

This situation is comparable to benefits that households receive under the Food Stamp Act, 7 U.S.C. § 2011 (1982), *et seq.*, administered by the Department of Agriculture. Under the food stamp program, eligible households receive allotments of food stamps based on the household's size, income and expenses. 7 C.F.R. Part 273 (1983). The household then uses the food stamps to purchase food to raise the household's nutrition level. 7 U.S.C. § 2011 (1982). If the household purchases food at participating stores but pays too much for the food by reason of a mistake, fraud or price-fixing, the household is obviously injured because it is able to purchase less food. The U.S. Department of Agriculture, however, is not injured by the inflated food prices paid by the household; the federal government's payment of benefits to the household did not increase at all as a result of the overcharge. In this context, it is easily seen that only the household is injured and that the Department of Agriculture is not entitled to restitution from the injured household.

This same conclusion applies with equal force to the present situation. Tennessee sustained all the injury, and the FHWA is not entitled to restitution.

C. The Rule Of Law Adopted By The Court Of Appeals Will Have A Large Impact On The States

The Sixth Circuit's decision that the FHWA is en-

titled to a share of Tennessee's recovery has the potential for a substantial monetary impact on the states.

From December, 1979 until April, 1984, the U. S. Department of Justice filed 270 indictments or criminal informations in twenty states against about 500 individuals and firms, charging them with rigging bids on highway construction projects. U.S. Dept. of Justice Road Building Cases, 1979 to 1984 (unpublished report). The federal investigation into bid rigging is continuing, and additional indictments are likely.

Because the typical course for a bid rigging case is that state treble-damage actions follow federal indictments, each indicted individual and firm is a possible defendant in a state action for damages. Indeed, the states have been pursuing many damage actions against bid riggers. From December, 1980 until February, 1985, nineteen states recovered almost $70 million from bid riggers, and additional damage actions are currently in litigation. (Compiled from National Association of Attorneys General, *Antitrust Reports*, December, 1980 to February, 1985). The FHWA has stated that it intends to use the favorable ruling from the Sixth Circuit as a basis for seeking reimbursements from states in addition to Tennessee. Appellant's Brief to the Sixth Circuit at 7, n. 6. It is requesting about 38 percent of Tennessee's recovery, and if it seeks a similar percentage from other states, the states will lose $26 million of the $70 million recovery.[4]

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[4] From some states, such as Colorado, the FHWA is requesting about 85 percent of the state's recovery.

The FHWA's request to Colorado should be noted for an additional reason. In its brief to the Sixth Circuit, at pages 47 to 48, the FHWA argued that it is entitled to restitution from Tennessee because the state improperly used money recovered from bid riggers on non-highway projects. Yet in Colorado, where the courts have ordered that all money recovered from bid riggers must be paid to the Department of Highways for use in highway construction, the FHWA nonetheless seeks a very large share of that state's recoveries.

Moreover, because "the federal government makes many hundreds of grants each year to state and local governments", *D.R. Smalley & Sons, Inc. v. U.S.*, 372 F.2d 505, 507 (Ct. of Claims 1967), the Sixth Circuit's decision has potential impact in areas far removed from the Federal Highway Act and road construction bid rigging. Anytime a federally-funded state project is the target of a price-fixing conspiracy, *Tennessee v. Dole* could be used by a federal agency to claim a share of a state's antitrust damages. The states will be relegated to the role of bringing antitrust damage actions on behalf of the federal government.

The states and their political subdivisions receive federal funds for a number of purposes. For example, with federal grants, the states provide health care,[5] construct low-income housing,[6] urban mass transportation systems,[7] and airports.[8] In the past, many of these federally-funded state projects have been victimized by price-fixers. *See, e.g., U.S. v. Allied Asphalt Paving Co.*, 451 F.Supp. 804 (N.D. Ill. 1978) (bid rigging on runway construction at O'Hare Airport); *U.S. v. Borden, Inc.*, No. LR-Cr-77-60 (E.D. Ark. 1977), *reported in* 1970-1979 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 45,077, p. 53,691 (bid rigging on contracts to sell dairy products to schools as part of the school lunch program). Because of *Tennessee v. Dole*, the states will find that the FHWA is not the only federal agency asking for a part of the states' antitrust recoveries. Instead, any federal agency that provides funding for state projects will now be

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[5] 42 U.S.C. § 1396 (1982), *et seq.*
[6] 42 U.S.C. § 1437 (1982), *et seq.*
[7] 49 U.S.C. § 1601 (1982), *et seq.*
[8] 49 U.S.C. § 1101 (1964), *et seq.* (repealed 1970).

able to assert a claim for a portion of the states' antitrust damages.

Additionally, the decision of the court below has potential impact on the states in another way. Because Tennessee, in the Sixth Circuit's view, is not legally entitled to retain the full amount of the recovery, highway bid riggers will see that by combining the decision with the law of standing, they can assert that Tennessee and other states may not bring antitrust actions against them seeking the full amount of overcharges. The bid riggers will argue that recent decisions on standing emphasize that a litigant must assert only his own legal interests, rather than those of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 509 (1975), *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Thus, the argument from the bid riggers will be that the states lack standing to recover damages that legally belong to the FHWA. If courts accept this argument, the *Tennessee v. Dole* decision will greatly decrease the amount states can recover from bid riggers, thereby further reducing incentives for the states to bring actions to enforce the antitrust laws. Moreover, this result may mean that bid rigging defendants escape the major portion of their liabilities because the FHWA may not be able to sue them directly. *U.S. v. Azzarelli Construction Co.*, 647 F.2d at 758 n. 1 (U.S. conceded that it may not sue bid riggers under the antitrust laws).

Finally, the Sixth Circuit's ruling reduces the ability of the states to provide funds to match road-building funds offered by the FHWA. An example illustrates this point. If a state recovers $1 million from a highway bid rigger, the state can then use the money to match $9 million in road-building funds provided by the FHWA. 23 U.S.C. § 120(c) (1982). But if the FHWA takes ninety percent of the state's recovery, the state then can use the remaining $100,000 to

match only $900,000 in federal funds. Permitting the FHWA to recover from the states vastly reduces the states' ability to finance road construction.

IV. CONCLUSION

For the foregoing reasons, the amici states respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

ROBERT K. CORBIN
Attorney General of Arizona

ALISON B. SWAN
Chief Counsel
GARY P. BRADY
Assistant Attorney General
Antitrust Division

ROBERT K. CORBIN

(Additional list of counsel on inside front cover)

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In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE, ETC., PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

DOUGLAS N. LETTER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

17pp

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation is authorized to make adjustments in federal payments to the State of Tennessee under the Federal-Aid Highway Act (23 U.S.C. 101 *et seq.*) to reflect the fact that the highway construction costs for which federal funds were previously expended had been inflated due to bid rigging by contractors and the State had recovered such overcharges from the contractors.

2. Whether equitable estoppel bars the Secretary's proposed adjustments.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bell v. *New Jersey*, 461 U.S. 773	8
Bennett v. *Kentucky*, No. 83-1798 (Mar. 19, 1985)	8
Bennett v. *New Jersey*, No. 83-2064 (Mar. 19, 1985)	8
Collins v. *Donovan*, 661 F.2d 705	7
Grand Trunk W. Ry. v. *United States*, 252 U.S. 112	7, 8
Heckler v. *Community Health Services*, No. 83-56 (May 21, 1984)	5, 11, 12
Jacquet v. *Westerfield*, 569 F.2d 1339	8
Massachusetts v. *Connors*, 248 F. Supp. 656, aff'd, 366 F.2d 778	5
Mount Sinai Hospital v. *Weinberger*, 517 F.2d 329, cert. denied, 425 U.S. 935	7
Pennsylvania Department of Transportation v. *United States*, 643 F.2d 758, cert. denied, 454 U.S. 826	7
Portsmouth Redevelopment & Housing Authority v. *Pierce*, 706 F.2d 471, cert. denied, No. 83-90 (Nov. 7, 1983)	5
Schweiker v. *Hansen*, 450 U.S. 785	12
United States v. *Azzarelli Construction Co.*, 647 F.2d 757	8, 9, 10
United States v. *Wurts*, 303 U.S. 414	8
West Virginia v. *Secretary of Education*, 667 F.2d 417	8

TABLE OF AUTHORITIES—Continued

Statutes:	Page
False Claims Act, 31 U.S.C. (1976 ed.) 231 *et seq.*, now codified at 31 U.S.C. 3729 *et seq.*	8
Federal-Aid Highway Act of 1956, 23 U.S.C. 101 *et seq.*	2
23 U.S.C. 101	2
23 U.S.C. 105	2
23 U.S.C. 110	2
23 U.S.C. 112	2
23 U.S.C. 120	2, 6
28 U.S.C. 1346(a)(2)	5
28 U.S.C. 1491(a)(1)	5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1650

STATE OF TENNESSEE, ETC., PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 749 F.2d 331. The opinion of the district court (Pet. App. A14-A49) is reported at 567 F. Supp. 704.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 29, 1984. A petition

for rehearing was denied on January 21, 1985 (Pet. App. A13). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal-Aid Highway Act of 1956, as amended (23 U.S.C. 101 *et seq.*), provides extensive federal financial assistance to states for construction of a nationally linked road network. See 23 U.S.C. 101. Under the Act, the federal government pays statutorily designated shares (usually 75 or 90%) of construction costs on federally approved state highway building projects. See 23 U.S.C. 105, 120. This federal aid system is administered by respondent Secretary of Transportation, who is responsible for apportioning among the states, according to a statutory formula, funds appropriated by Congress for highway construction. When a state's proposed highway project is approved by the Secretary, the state and the federal government enter into a contract in which the federal government agrees to pay the percentage of the construction costs specified in the Act and the state agrees to pay the remaining costs and to maintain the highway thereafter. See 23 U.S.C. 110. After the project is approved, the state may contract, through competitive bidding, with private construction companies to build the road. See 23 U.S.C. 112.

2. Beginning in 1979, the federal government brought a series of prosecutions against Tennessee construction firms for collusive bidding on federally assisted highway projects. After the government obtained more than 70 convictions in these cases, petitioner began civil investigations into bid rigging. These investigations resulted in settlements with a

number of bid riggers who agreed to pay back to petitioner approximately $12 million in overcharges stemming from collusive bidding.

In October 1981, the Secretary requested that petitioner provide data concerning these settlements in order to determine the amount of the recovered overcharges that represented federal assistance. The Secretary explained that, because the Federal-Aid Highway Act limits federal payment to a set percentage of legitimate construction costs, the federal amounts had to be recomputed in light of the recovered overcharges. Without such an adjustment, petitioner would have received double payment—once by the federal government under the Federal-Aid Highway Act and once by the bid riggers who repaid petitioner for the excessive charges. The Secretary indicated, however, that the federal funds in question would be made immediately available for use by petitioner for other federally approved road construction projects.

Petitioner declined to provide the requested information. It contended that the federal highway money was a gift over which the Secretary had lost all control and that, once the federal money had been recovered from bid riggers, it could be spent in any way the State chose.

In view of petitioner's refusal to furnish any data, the Secretary made an accounting using other sources of information and concluded that, taking into consideration the amounts petitioner had expended in obtaining the recoveries from the bid riggers, $4.5 million was attributable to financial assistance provided by the federal government.[1]

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[1] The basis for the Secretary's proposed adjustment was the actual amount of federal assistance, not treble damages

3. Petitioner then filed this suit in the United States District Court for the Middle District of Tennessee. It sought an injunction to prevent the Secretary from taking any action to recoup the federal share of the recoveries. The district court granted the injunction, holding that, once the highway funds were allocated to Tennessee, they constituted a gift to the State and became solely state funds in which the federal government had no interest. In the alternative, the district court held that the Secretary was equitably estopped from making any adjustment because the Assistant Attorney General in the Antitrust Division of the Department of Justice had told petitioner that the United States had no interest in petitioner's efforts to recover the overcharges. Pet. App. A14-A49.

4. The court of appeals reversed (Pet. App. A1-A12). It held as a matter of federal common law that the Secretary is entitled to restitution of federal grant monies under a standard of unjust enrichment; accordingly, it remanded the case to the district court to determine the amount involved in light of "the equities of the situation" and the efforts of petitioner to obtain the antitrust recoveries (*id.* at A11). The court of appeals also concluded that the doctrine of equitable estoppel does not bar the Secretary's proposed action because the statement by the Assistant Attorney General for Antitrust did not apply to adjustments under the Federal-Aid Highway Act and because in any event the only detriment suffered by petitioner was its " 'inability to retain money that it

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under the antitrust laws. In this case it appears that petitioner's settlements with the bid-rigging defendants were based on single rather than treble damages (see C.A. App. 21, 86).

should never have received in the first place' " (*id.* at A12, quoting *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9).

ARGUMENT

Petitioner contends that the court of appeals erred in holding that it was unjustly enriched when it refused to account to the federal government for a share of the amounts it had recovered from bid riggers on federally assisted highway projects. However, that decision is correct and does not conflict with the decisions of this Court or any other court of appeals. While we do not agree with all of the court of appeals' reasoning,[2] petitioner is not entitled to judgment, and further review by this Court is not warranted.

1. At the outset, we note that the court of appeals has remanded the matter to the district court and thus the case is currently in an interlocutory posture. The court of appeals' decision leaves petitioner in precisely the same position it would have occupied if the district court in the first instance had held that the Secretary was entitled to take account of the recovery of the bid-rigging overcharges and had sched-

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[2] The government argued below that this case was in the nature of a contract dispute involving a claim in excess of $10,000 and therefore was within the exclusive jurisdiction of the Claims Court. See 28 U.S.C. 1346(a)(2) and 1491(a)(1); *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F.2d 471 (4th Cir. 1983), cert. denied, No. 83-90 (Nov. 7, 1983); *Massachusetts* v. *Connor*, 248 F. Supp. 656 (D. Mass.), aff'd, 366 F.2d 778 (1st Cir. 1966). Both courts below rejected this argument and held that the district court had jurisdiction (Pet. App. A6-A9, A15). We have not sought this Court's review of the jurisdictional issue.

uled further proceedings to determine the exact amount involved. In that circumstance, petitioner could not seek review of the rejection of its contention that no adjustment by the Secretary would be permissible. Review of the instant petition would likewise be premature. Following the ultimate disposition of the entire case in the lower courts, petitioner will be able to present to this Court the contentions it now raises, together with any other claims it may have, in a petition for a writ of certiorari to review the final judgment.

2. In any event, the decision of the court of appeals is correct and does not call for this Court's review. The Federal-Aid Highway Act explicitly limits the federal share of construction costs on a highway project. See 23 U.S.C. 120. In this instance, federal money was mistakenly paid out to petitioner on the basis of erroneous cost figures that were inflated because of bid rigging. Once the bid rigging was discovered by the federal government and the overcharges refunded to petitioner by the bid riggers, a new accounting was necessary to determine the proper statutory federal share of the correct costs. In the absence of the proposed adjustments, the federal share of the revised costs of the construction projects would exceed the allowable percentages set by Congress in the Act.

The Secretary's proposed action would return petitioner to the position it would have been in if the illegal bid rigging had never occurred. Under the adjustments that petitioner contests, the federal assistance at issue would be available to petitioner for use in future federally-approved highway construction projects; even after the Secretary makes the nec-

essary correction, petitioner will receive its full statutory allocation of federal highway funds. Accordingly, the only dispute in this case between the Secretary and petitioner is whether the funds in question will be used by the State for purposes contemplated by the Federal-Aid Highway Act, as the Secretary contends, or whether it will inure to the State without restriction for any use—including non-road construction use—that the State chooses. Clearly the former position is correct and more in accord with the congressional purpose behind federal financial assistance under the Federal-Aid Highway Act. Even the district court, in holding in petitioner's favor, nonetheless observed that petitioner "has used its recoveries from the bid-riggers for non-Highway Act purposes. * * * To that extent, the State has clearly diverted Highway Act funds for purposes other than those outlined in the Highway Act. This [c]ourt disapproves of * * * [such uses] of recovered Highway Act funds for purposes inconsistent with the Highway Act" (Pet. App. A40).

As the court of appeals noted (Pet. App. A10), this Court has long recognized that federal officials can utilize set-off procedures to recover federal money erroneously paid out. See, *e.g.*, *Grand Trunk W. Ry.* v. *United States*, 252 U.S. 112 (1920). This power has also been consistently recognized by the courts of appeals. See, *e.g.*, *Pennsylvania Department of Transportation* v. *United States*, 643 F.2d 758 (Ct. Cl.), cert. denied, 454 U.S. 826 (1981); *Collins* v. *Donovan*, 661 F.2d 705, 708 (8th Cir. 1981); *Mount Sinai Hospital* v. *Weinberger*, 517 F.2d 329, 337 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976). In addition, this Court and the courts of appeals have found a common law right of the United States to

recover funds mistakenly paid, and this non-statutory right exists unless Congress clearly manifests an intent by statute to bar such a recovery. See *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Grand Trunk W. Ry.* v. *United States*, 252 U.S. at 121; *West Virginia* v. *Secretary of Education*, 667 F.2d 417, 419 (4th Cir. 1981); *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1342 (5th Cir. 1978).

In light of these settled principles, the court of appeals correctly rejected petitioner's argument that the federal government has no right to recover erroneously paid Federal-Aid Highway Act funds. A contrary decision would mean that petitioner would be entitled in effect to double reimbursement—once from the federal government under the Highway Act and once from the bid riggers under the antitrust laws—that would confer upon it a windfall amount in excess of the actual, legitimate cost of the road construction.[3]

Nor, contrary to petitioner's contention, is the ruling below in conflict with *United States* v. *Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). In *Azzarelli*, the United States sought double damages and forfeiture from an individual contractor under the False Claims Act (31 U.S.C. (1976 ed.) 231 *et seq.*, now codified at 31 U.S.C. 3729 *et seq.*) for bid rigging on a construction project funded pursuant to the Federal-Aid Highway Act. The court of appeals

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[3] Petitioner's suggestion (Pet. 8-10) that its position is supported by considerations of equity is not only incorrect (see pages 6-7, *supra*) but would not in any event undermine the Secretary's legal authority to take account of petitioner's recovery for the construction overcharges. See *Bennett* v. *New Jersey*, No. 83-2064 (Mar. 19, 1985), slip op. 13-14; *Bennett* v. *Kentucky*, No. 83-1798 (Mar. 19, 1985), slip op. 5-8; *Bell* v. *New Jersey*, 461 U.S. 773, 790-791 (1983).

held that the United States had no cause of action under the False Claims Act because, in light of the fact that the federal government paid a fixed amount to the state for road construction, there was no injury to the funds or property of the United States as required under that Act. As the court explained (647 F.2d at 761-762 & n.5):

> [The funding mechanism of the Federal-Aid Highway Act] operated to insulate the United States from any overcharges. Although the overcharge may have increased the contribution of the United States toward the two particular projects, it did not affect the Government's overall contribution to Illinois.
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> * * * * *
>
> [In this situation, there is an] absence of any injury sufficient under the False Claims Act.[5]

[5] In an attempt to meet the injury requirement, the Government argues in its brief that the United States was injured because fewer highway miles were constructed because of the overcharge. Such an "injury" is not alleged in the complaint and, if in fact such a shortfall occurred, this would not be an injury to the money or property of the United States within the meaning of the False Claims Act.

Whatever the correctness of *Azzarelli* concerning the type of injury necessary to sustain a False Claims Act action against a contractor, it is not inconsistent with the court of appeals' decision in this case. The adjustment sought here by the Secretary is designed to enforce the State's compliance with the terms of the Federal-Aid Highway Act and does not depend upon a showing of injury to the money or property of the United States. Under the principles discussed

above, it is sufficient that federal funds were paid out in a manner inconsistent with the highway program.[4] This is an adequate basis for the Secretary to make appropriate adjustments to ensure that the federal portion of the overcharges recovered by petitioner is used for the federal-aid highway program as Congress intended and not, as petitioner seeks, for other purposes. In contrast, the False Claims Act suit in *Azzarelli* was brought against a third-party contractor rather than against a federal grantee and involved allegedly fraudulent acts harmful to the money or property of the United States rather than the regulatory requirements of a federal aid program. Accordingly, nothing in *Azzarelli* governs the issue in this case or conflicts with the decision below.[5]

3. Petitioner also incorrectly argues (Pet. 11-12) that the Secretary is equitably estopped from making any adjustment to reflect petitioner's recovery of the overcharges. This argument rests on the statement of the Assistant Attorney General for Antitrust that "his office 'had no interest in Tennessee's efforts to recover any over charges due to bid rigging on federal highway construction projects' and that Tennessee's efforts to recover 'were matters for the State

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[4] As petitioner acknowledges (Pet. 4), the effect of the bid rigging in Tennessee was that fewer miles of road were built with the federal funds provided.

[5] Petitioner also contends (Pet. 10) that the federal government's sole remedy was to bring its own civil antitrust action against the bid riggers. Even assuming that such an action would lie (but see *Azzarelli*, 647 F.2d at 758 n.1, 761), that right to redress for antitrust injury does not detract from the government's separate right, which is at issue here, to ensure that federal grants are properly spent for their intended purpose.

and its officials' " (Pet. App. A3). As the Assistant Attorney General explained (*id.* at A17), "in 1980 the Division's position was 'that only the State was injured in its property by reason of bid-rigging on such highway construction projects and that the United States had no legal claim or interest in such recoveries under the federal antitrust laws.' "

Even assuming that the doctrine of equitable estoppel applies against the government, it would not bar the Secretary's action in the circumstances of this case. First, fairly read in context, the above statements of the Assistant Attorney General clearly cannot be understood to exempt petitioner's overcharge recoveries from any interest of the federal government under the entire United States Code; rather, those statements indicate only that the Antitrust Division would not, under the antitrust laws, assert a claim to petitioner's recoveries based on competitive injury from illegal bid-rigging.[6] Moreover, to the extent petitioner took the statements more broadly, it did not rely on them to its detriment; instead, as the court of appeals observed, "the only 'detriment' to [petitioner as] the party asserting estoppel against the government is simply its 'inability to retain money that it should never have received in the first place' " and that it seeks to use for purposes unrelated to the Federal-Aid Highway Act (Pet. App. A12, quoting *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9).[7] In light of

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[6] Furthermore, the Assistant Attorney General specifically explained to petitioner that his statement "was, of course, subject to change and I could in no way bind future administrations" (C.A. App. 148).

[7] In fact, it is doubtful that petitioner relied on those statements at all, since many of the settlements—all of which

these two factors, estoppel would not lie against a private party and therefore is necessarily unavailable against the government. See *Heckler* v. *Community Health Services*, slip op. 9, 14. Finally, any inconsistency between the cited statements and the Secretary's proposed action in this case would not constitute "affirmative misconduct" that is the precondition for a claim of estoppel against the government (see, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 788-790 (1981)); at most, petitioner has charged that the government departed from the previous position of one of its officials, which plainly falls far short of the required element of affirmative misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

DOUGLAS N. LETTER
Attorney

MAY 1985

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used a standard form—were reached before petitioner's meeting with the Assistant Attorney General. See, *e.g.*, C.A. App. 22.

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